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Supreme Court, U.S.
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No. ———

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

JANET B. STONE, *et al.*,
Petitioners,

v.

NORTH CAROLINA DEPARTMENT OF LABOR and
NORTH CAROLINA DEPARTMENT OF LABOR,
OCCUPATIONAL SAFETY AND HEALTH DIVISION,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Supreme Court of North Carolina violate the Federal OSHA Act when it concluded that the State of North Carolina could not be held liable for negligently enforcing its OSHA program on the ground that its OSHA enforcement authorities owed no duties to individual workers injured by their negligence?

LISTING OF PARTIES

Petitioners:

JANET B. STONE; ANNIE B. LOCKLEAR; MARY BARBARA WASHINGTON; CARRIE M. GALLOPS and WILLIAM E. PEELE, Jr., Co-Administrators of the Estate of ROSE GIBSON PEELE; JIMMY BROADY, Administrator of the Estate of MINNIE THOMSPON; LILLIE B. DAVIS; JOHNNY DAWKINS; SHARON E. TOWNSEND; GEORGIA ANN QUICK; RONALD WAYNE POOL; ALFORENCE ANDERSON, Administrator of the Estate of PEGGY JEAN ANDERSON; DAVID MACK ALBRIGHT, Administrator of the Estate of DAVID MICHAEL ALBRIGHT; FRED ERNEST BARRINGTON, SR. and NELSON BARRINGTON, Co-Administrators of the Estate of JOSEPHINE BARRINGTON; PEARLIE GAGNON, Administratrix of the Estate of JOHN R. GAGNON; MATTIE FAIRLEY; MARTHA WATERS; EVELYN WALL; KENNETH WHITE; CONESTER WILLIAMS; JOHN SANDERS; LARRY BELLAMY, Administrator of the Estate of ELIZABETH ANN BELLAMY; SARAH WILLIAMS; NELSON BARRINGTON and LINDA OWENS, Co-Administrators of the Estate of FRED BARRINGTON, JR.; ADA BLANCHARD, AUDREY SUE SCOTT; LETHA TERRY; ELAINE GRIFFIN; KIM MANGUS; SYLVIA MARTIN; GLORIA MALACHI; ALBERTA McRAE; SANDRA McPHAUL; EVANDER LYNCH, Administrator of the Estate of JANICE LYNCH; BERNETTA ODOM; THOMAS OATES, III; KATIE NICHOLSON; PAMELA MOORE; PRISCILLA MURPHY; SALLY MURPHY; NORA BUSH; THOMAS COBLE; BRENDA CHAMBERS, Administratrix of the Estate of ROSIE ANN CHAMBERS; BERNARD CAMPBELL; ROSE CHAPPELL; MARTHA NELSON, Administratrix of the Estate of MARTHA RATLIFF; DEBORAH PITTMAN;

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Respondents:

NORTH CAROLINA DEPARTMENT OF LABOR and NORTH CAROLINA DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH DIVISION

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PETITION FOR A WRIT OF CERTIORARI

Janet B. Stone, and each of the other plaintiffs named on the caption hereof, respectfully petition this Court for a writ of certiorari to the Supreme Court of North Carolina.

OPINIONS BELOW

The Supreme Court of North Carolina's denial of plaintiffs' petition for rehearing (App. at 27a) is reported at —— N.C. ——, —— S.E.2d —— (1998). The opinion of the Supreme Court of North Carolina (App. at 1a-21a) is reported at 347 N.C. 473, 495 S.E.2d 711 (1998). The opinion of the North Carolina Court of Appeals (App. at 22a-26a) is reported at 125 N.C. App. 288, 480 S.E.2d 410 (1997). The decision of the North Carolina Industrial Commission (App. at 28a-31a) is un-

reported. The decision of Deputy Commissioner Bernard Alston (App. at 32a-33a) is unreported.

JURISDICTION

The Supreme Court of North Carolina denied plaintiffs' petition for rehearing on 2 April 1998. (App. at 27a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The Federal OSHA Act provides, in pertinent part, that "Congress declares its purpose * * * to assure so far as possible to every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C.S. § 651 (1990). It further provides that, where a state assumes "responsibility for development and enforcement therein of occupational safety and health standards," it must ensure that the "standards (and the enforcement of which standards) are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under [the Federal OSHA Act]." 29 U.S.C.S. § 667 (1990). Where the federal government administers an OSHA program, its negligent performance resulting in worker injury is actionable under the Federal Tort Claims Act "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C.S. § 2674 (1990). The Supreme Court of North Carolina concluded under its Tort Claims Act, N.C. Gen. Stat. § 143-291 (1996), that North Carolina may not be liable for negligent enforcement of its State OSHA program by reason of the "public duty doctrine." Thus, it has allowed North Carolina to provide less protection to North Carolina workers than is provided to workers under federal OHSA. This decision, therefore, violates federal law, which requires a contrary result.

STATEMENT

A. A Case of Governmental Indifference.

1. *Summary.*

This case arises out of one of the worst industrial disasters in American history—the catastrophic fire of 3 September 1991 at the Imperial Food Products Plant in Hamlet, North Carolina. The fire resulted in twenty-five fatalities and profound personal injuries to dozens of other victims. After the fire, the United States Department of Labor conducted an investigation that revealed a gross dereliction of duty by the North Carolina Department of Labor and its Division of Occupational Safety and Health (sometimes, "defendants"), which had voluntarily undertaken control in North Carolina of occupational safety and health programs from the federal government. As part of this undertaking, defendants accepted the statutory and quasi-contractual duty to enforce the state OSHA program at least as effectively as the federal government enforces the federal program. As a *quid pro quo* for the State's undertaking, the federal government was excluded from any role in enforcing occupational safety and health laws in North Carolina.

As shown below, defendants failed miserably in their enforcement and inspection duties, proximately causing the injuries and deaths complained of in this action. Yet, the Supreme Court of North Carolina allowed defendants to avoid liability for their egregious negligence under the state's Tort Claims Act by defining defendants' duties as flowing generally to the public at large, rather than to the affected workers. This holding conflicts with a number of federal court decisions, including at the Circuit Court of Appeals level, interpreting the Federal OSHA Act and the Federal Tort Claims Act, 28 U.S.C.S. § 2671 *et seq.* (sometimes, "FTCA"). These courts have recognized that the Federal OSHA Act can, in appropriate circumstances, give rise to duties owed by the federal

government to individual workers who may pursue negligence claims against it under the FTCA. Therefore, the decision below violates federal law because it allows a state to provide less protection to workers under the state's OSHA program that is provided by the federal program.

By barring plaintiff's claims under the "public duty doctrine" without even acknowledging the State's duty under federal law, the Supreme Court of North Carolina has not only ignored that law, it has flouted the will of Congress. Failure to rectify this error will allow defendants to continue: (1) to violate the federal mandate they have voluntarily undertaken without incurring any adverse consequences; (2) to have no accountability to victims of their negligence; and (3) to enjoy an immunity from suit that the Federal OSHA Act does not permit.

2. *The Hamlet fire and its aftermath.*

On 3 September 1991, the claimants or their decedents (collectively, "claimants" or "plaintiffs") were lawfully on the premises of the Imperial Foods Products, Inc. ("Imperial") plant in Hamlet, North Carolina, attending to their respective employment duties. Imperial was engaged in processing chickens at this site when a hydraulic line near a deep fat fryer ruptured, igniting hydraulic fluid just a few feet away from a natural gas fume cooker used in chicken preparation. The line sprayed flammable hydraulic fluids at high pressure against the floor and the nearby cooker. The resulting fire grew in intensity and spread through the interior of the plant, causing toxic gases and black smoke to build throughout the building. Because escape routes were either non-existent or had been locked or blocked, the toxic gases overcame many of the claimants, killing twenty-five and causing many others severe personal injuries such as brain damage, loss of motor capacity, pulmonary incapacity, and near-total blindness.

After the fire, defendants carried out their first and only inspection in the eleven-year period that Imperial operated the Hamlet plant. A single prior inspection would have revealed the plant had unmarked, inadequate, inaccessible and blocked exits, inadequate or no fire suppression systems, and other conditions violating the Occupational Safety and Health Act of North Carolina ("OSHANC").[1]

Defendants discovered in their post-accident inspection that the Imperial plant was teeming with fire hazards and other conditions violative of the Federal OSHA Act and OSHANC standards. Defendants issued against Imperial eighty-three citations for violaitons of OSHANC standards, most classified as "willful." Among the worst were citations for maintaining locked, blocked and inoperable exit doors that shut off any chance for workers to escape.

3. ***Defendants' duties.***

Over twenty-five years ago, Congress enacted the Occupational Safety and Health Act of 1970, now codified at 29 U.S.C.S. § 651 *et seq.* (1990) (sometimes, "Federal OSHA Act"). Pursuant to the Act, the United States Department of Labor has established standards regulating workplace safety and has implemented enforcement mechanisms. As an alternative to federal administration, the Federal OSHA Act allows states to assume responsibility for development and enforcement of its standards. 29 U.S.C.S. § 667 (1990).

A state program (sometimes "State OSHA Program") must be at least as effective in providing safe and healthful employment and places of employment as the stand-

---

[1] For all practical purposes, OSHANC is identical to the Federal Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. § 651 *et seq.* (sometimes "the Federal OSHA Act"), and the regulations promulgated thereunder. 29 C.F.R. § 1901.1 *et seq.* *Compare* Title 29 of the Code of Federal Regulations *with* Title 13 of the North Carolina Administrative Code.

ards promulgated under the federal OSHA Act. 29 U.S.C.S. § 667(c) (1990). State OSHA programs must provide for sufficient legal authority and qualified personnel to enforce standards and must have adequate funds devoted to administration and enforcement. *Id.* Only then may a plan be approved. Each state with an approved OSHA program has a continuing obligation to provide safety standards, funding, staffing and enforcement at least as effective as that provided under the Federal OSHA Act and regulations. 29 U.S.C.S. § 667(c,f) (1990); 29 C.F.R. § 1902.3 *et seq.*

On 26 January 1973, the United States Department of Labor gave its initial approval to North Carolina's proposed plan for adopting and enforcing workplace safety and health regulations. It certified the program as having completed all developmental steps on 6 October 1976. The North Carolina Department of Labor was designated as the state agency responsible for administering OSHANC. N.C. Gen. Stat. § 95-126(b) (1993). The Division of Occupational Safety and Health, a division of the North Carolina Department of Labor, was established under N.C. Gen. Stat. § 95-133 and is charged with the duty of carrying out North Carolina's State OSHA program.

4. ***Defendants breached duties owed to plaintiffs.***

The foregoing federal statutes and regulations impose on defendants a legal duty to maintain and enforce the State OSHA Program at the same level of effectiveness as the federal OSHA program. 29 U.S.C.S. § 667 (1990). Yet, when the United States Department of Labor investigated defendants' program as a result of the Hamlet fire, it determined defendants had failed to carry out their duties at the requisite level. Significantly, defendants failed to use funds that had been made available by the federal government for hiring and training of inspectors and carrying out inspections. In fact, defendants had *refunded* money provided for these purposes to the fed-

eral government. Defendants' inadequate performance included an insufficient number of inspectors and inspections, insufficient programs for planned inspection of industries, failure to provide or obtain adequate funding or personnel for inspection, failure to discharge their duties, and maintenance of a workplace safety program at a less effective level than the federal program.

The United States Department of Labor's inquiry and investigation thus established serious violations of defendants' statutory duties under 29 U.S.C. § 667. More importantly, by carrying out a completely inept OSHA program, defendants also breached their duties to the people working at the Hamlet plant.

Defendants' failure ever to inspect Imperial's Hamlet plant while it was operational did not occur in a vacuum. It continued even though two prior fires had occurred at the plant. Defendants knew or in the exercise of reasonable care should have known of both fires, but they did not inspect the plant either before or after the occurrences. Even a cursory inspection would have revealed the plant's unmarked, inadequate, inaccessible, locked and blocked exits, and its inadequate fire suppression systems.

By contrast, Imperial operated an out-of-state facility that federal OSHA inspectors visited regularly. In 1985, federal OSHA inspectors concluded that employees at Imperial's Moosic, Pennsylvania plant were being exposed to unprotected hot oil lines running near the floor between a fryer and an oven. In an incident hauntingly similar to the Hamlet catastrophe, one of these lines burst and caused an employee to sustain burns over 35% of her body, resulting in federal OSHA citations being issued to Imperial.

Two years later, in 1987, a federal OSHA inspector again cited Imperial for conditions at its Moosic plant. The inspector determined that employees were not adequately protected from fire hazards because the means of ingress and egress were improperly constructed and

labeled and were not adequately accessible. Federal OSHA issued citations to Imperial and found that its top management had demonstrated hostility and an "utter contempt for OSHA." This information, and the information about the 1985 incident, was available to defendants. Despite actual or constructive notice of the repeated fires and fire hazards, both in North Carolina and in Pennsylvania, defendants still failed to inspect the Hamlet plant.

5. ***Defendants' inspections after the 3 September 1991 fire.***

Defendants inspected Imperial's Hamlet plant after the disastrous 3 September 1991 fire and found conditions causing them to issue eighty-three OSHANC citations. They discovered, among other conditions, that Imperial had failed to: maintain a fire suppressant sprinkler system as required by law; provide proper evacuation plans and means of egress should the plant catch fire; provide unlocked, unblocked and operable exits as required by law; require adequate safety precautions considering the highly flammable substances being used in the presence of cooking and frying operations and the highly corrosive materials being used; label or identify exits adequately so that the employees could find their way out of the plant in the event of a fire; provide adequate fire alarm facilities to alert employees; conduct fire exit drills in order to create an orderly means of escape; and train employees in fire extinguisher used and fire containment in emergencies.

Had defendants fulfilled their legal duties, such as inspecting the plant at reasonable intervals during the eleven years preceding the fire, these conditions would have been discovered and corrected, and the catastrophic events of 3 September 1991 would not have occurred. But defendants did not do what reasonable prudence and the statutes justifying and governing their existence required. Instead, they egregiously breached their duties to plain-

tiffs, leaving twenty-five people dead and at least eighty-one others injured.

Among the tragic aspects of this case is that the fire would have been prevented if defendants had not actively engaged in conduct that precluded federal OSHA involvement. If the Federal OSHA authoriites had been responsible for inspection and enforcement in North Carolina, they would have provided the protection contemplated by OSHA. That federal authorities were regularly inspecting Imperial's facility in Pennsylvania—a jurisdiction where negligent OSHA inspections are actionable—while the Hamlet facility was ignored eleven years by State OSHA authorities, illustrates the serious deviations between the two sets of OSHA compliance programs.

B. Proceedings Below.

Each of the plaintiffs timely filed a verified claim against the proper defendants in the North Carolina Industrial Commission as required by the North Carolina Tort Claims Act. The claims alleged the factual and legal bases for relief as set forth above. Defendants made motions to dismiss pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure, which are identical to their federal counterparts. Deputy Commissioner Bernard Alston denied defendants' motions to dismiss. Defendants then availed themselves of an interlocutory right of appeal pursuant to N.C. Gen. Stat. § 1-277(b). The matter was considered by the full North Carolina Industrial Commission, which, on 19 December 1995, affirmed the decision of Deputy Commissioner Alston and ruled that the case could go forward.

Defendants took a further interlocutory appeal to the North Carolina Court of Appeals. In a unanimous decision reported at 125 N.C. App. 288, 480 S.E.2d 410 (1996) (App. at 22a-26a), the Court of Appeals affirmed the decision of the Industrial Commission. Defendants

then petitioned the Supreme Court of North Carolina for discretionary review, which was allowed.

In a 5-2 opinion, rendered on 6 February 1998, the Supreme Court of North Carolina reversed the decision of the Court of Appeals and held, for the first time, that North Carolina's "public duty doctrine," which had been previously applied only to local governments, would now be extended to claims brought against a state agency under the North Carolina Tort Claims Act. *Stone v. Department of Labor*, 347 N.C. 473, 495 S.E.2d 711 (1998) (App. at 1a-21a). The Court's reasoning was that "the governmental entity owes no particular duty to any individual claimant [and] cannot be held liable for negligence for a failure to carry out its statutory duties." (App. at 11a) (citing *Braswell v. Braswell*, 330 N.C. 363, 370, 410 S.E.2d 897, 901 (1991)). The Court further opined that, under the North Carolina Tort Claims Act, "[p]rivate persons do not possess public duties. Only governmental entities possess authority to enact and enforce laws for the protection of the public." (App. at 6a). It went on to reason that " '[A] government ought to be free to enact laws for the *public protection* without thereby exposing its supporting taxpayers . . . to liability for failures of omission in its attempt to enforce them. It is better to have such laws, even haphazardly enforced, than not to have them at all." *Grogan* [*v. Commonwealth*], 577 S.W.2d [4,]6 (emphasis added)." (App. at 10a).

The North Carolina court failed to acknowledge that, by undertaking OSHA enforcement responsibilities in North Carolina, defendants were required to assume, at a minimum, a set of federal duties below which state duties could not fall. The Court ignored the proposition that State OSHA standards, inspection, and enforcement could not be less effective than those imposed by federal OSHA.

Overlooking the federal requirement imposed on the State enabled the Court to use state policies to undergird its opinion—policies that might have been appropriate in an exclusively state-law setting. It is, however, *Congres*'s policy, as declared in the Federal OSHA Act, that must be oberved by state and federal courts in deciding cases in the OSHA arena.[2] The Supreme Court of North Carolina, therefore, erred in contravention of federal law by concluding that the public duty doctrine barred plaintiffs' claim on the basis of the state policies underlying the doctrine.

Although this case arises primarily out of a negligent failure to inspect rather than a negligently performed inspection, North Carolina tort law does not distinguish between acts and omisions for purposes of determining the State's liability. *Phillips v. N.C. Dept. of Transportation,* 80 N.C. App. 135, 341 S.E.2d 339 (1986). Nor do the North Carolina Tort Claims Act and cases interpreting it distinguish between discrtionary, proprietary, or governmental functions in determining the tort liability of the State. *Guthrie v. State Ports Authority,* 307 N.C. 522, 533, 209 S.E.2d 618, 624 (1983).

If such distinctions do exist under federal law, whether by virtue of the discretionary function exception to the FTCA or otherwise, *see, e.g.*, 28 U.S.C.S. § 2680(a) (1990); *Berkovitz v. United States,* 486 U.S. 531, 108 S. Ct. 1945, 100 L.Ed.2d 531 (1988), that factor is not a barrier to consideration of this case. The federal question in this case is to whom the OSHA authorities, state and federal, owe a *duty,* not what circumstances may render those entities immune from liability for negligent

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[2] Petitioners note that defendants' conduct also invokes jurisprudential questions under the Supremacy and Equal Protection clauses of the United States Constitution. In the interest of brevity, the discussion herein is limited to the legislative context. Should the Court request briefing on the constitutional issues, petitioners are happy to oblige.

malfeasanec. Therefore, the decision of the Supreme Court of North Carolina is not based on an adequate and independent state ground, *see e.g., Standard Oil Co. v. Johnson*, 316 U.S. 481, 62 S. Ct. 1168, 1170 (1942); and the federal law-based duty to individual workers necessarily vitiates the decision below.[3]

Any claims that may later arise against defendants for a negligently performed OSHA inspection are so clearly barred under *Stone*, that they would not be filed at all, and thus review would never lie in this Court. If the situation is to be rectified, it must be done in this case. Any other result would allow a direct conflict to continue between North Carolina's interpretation of duties owed by State OSHA occupational safety and health law and a proper decision rendered recently by the United States Court of Appeals for the First Circuit. *Irving v. United States*, No. 96-2368, 1998 WL 152941 (1st Cir. (N.H.), April 8, 1998).

Even though plaintiffs' claims were largely based upon deviation by defendants from the standards of care mandated by Federal OSHA, the Supreme Court of North Carolina refused to acknowledge in its opinion that there was a federal basis for these claims. Consequently, though it was not explicit, the "necessary effect of the [the court's] judgment [was] to deny the [federal] claim." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67, 73 L.Ed. 184, 187 (1928). Given that the United States

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[3] In fact, the sweep of the public duty doctrine announced in *Stone* is so broad as to bar *all* inspection-based claims. In *Hunt v. Department of Labor*, 348 N.C. 192, 499 S.E.2d 747 (1998), a companion case to *Stone*, the Supreme Court of North Carolina invoked the public duty doctrine to preclude recovery from the Department of Labor where the inspection (in that instance, of an amusement park ride) had actually occurred, but was negligently performed. Consequently, it is apparent that there is no distinction under the North Carolina public duty doctrine between negligent inspections and failures to inspect.

Department of Labor had taken the North Carolina Department of Labor to task for gross disregard of duties under federal law—a situation extensively briefed by plaintiffs below—it is astonishing that the Supreme Court of North Carolina refused even to acknowledge the federal mandate in its *Stone* opinion.

On 13 March 1998, plaintiffs timely petitioned the Supreme Court of North Carolina for rehearing. The Court denied the petition on 2 April 1998. (App. 27a).

REASONS FOR GRANTING PETITION

I. THE SUPREME COURT OF NORTH CAROLINA'S DETERMINATION THAT OCCUPATIONAL SAFETY AND HEALTH LEGISLATION DOES NOT CREATE ANY DUTIES TO INDIVIDUAL WORKERS IS CONTRARY TO THE FEDERAL OSHA LEGISLATION, CONTRARY TO THE LAW AS DECLARED BY THIS COURT, AND STANDS IN DIRECT CONFLICT WITH THE DECISION OF THE FIRST CIRCUIT COURT OF APPEALS IN *IRVING v. UNITED STATES.*

This case has its roots in the will of Congress. In reponse to a shocking number of workplace injuries, Congress passed the Occupational Safety and Health Act of 1970. That legislation provides, in pertinent part, as follows:

> § 651 CONGRESSIONAL STATEMENT OF FINDINGS AND DECLARATION OF PURPOSE AND POLICY.
>
> [(a)] The Congress finds that personal injuries and illnesses arising out of work situations impose substantial burdens upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.
>
> (b) The Congress declares it to be its purpose and policy, through the exercise of its powers to

> regulate commerce upon the several States . . . and to provide for the general welfare, *to assure so far as possible every working man and woman in the Nation safe and healthful working conditions* and to preserve our human resources . . . (9) by providing for the development and promulgation of occupational safety and health standards; [and] (10) by providing an effective enforcement program.

29 U.S.C.S. § 651 (1990) (emphasis added). The text of the Act itself focuses not on "the public" at large, but rather on the individual laborer. This Court has declared that the "fundamental objective of the Act [is] to prevent occupational deaths and serious injuries. The Act, in its preamble, declares that its purpose is 'to assure so far as possible every working man and woman in the Nation safe and healthful employment and places of employment and to *preserve* our human resource.' " *Whirlpool Corp.* v. *Marshall,* 445 U.S. 1, 11-12, 100 S. Ct. 883, 890, 63 L.Ed.2d 154 (1980) (emphasis in opinion). In fact, as noted in *Whirlpool,* the OSHA "Act's legislative history contains numerous referenes to the Act's preventive purpose and **to the tragedy of each individual death or accident."** *Id.* (n.16) (emphasis added).

This Court has closely focused on the legislative history and intent:

> As stated by Senator Yarborough, a sponsor of the Senate bill:
>
> "We are talking about people's lives, not the indifference of some cost accountants. We are talking about assuring the men and women who work in our plants and factories that they will go home after a day's work with their bodies intact."

Id. (citations omitted). The *Whirlpool* decision itself protected even a single individual under the Federal OSHA Act:

> The Act does not wait for an employee to die or become injured. It authorized the promulgation of health and safety standards and the issuance of citations in the hope that these will act to prevent deaths or injuries from ever occurring. It would seem anomalous to construe an Act so directed and constructed as prohibiting an employee, with no other reasonable alternative, the freedom to withdraw from a workplace environment that he reasonably believes is highly dangerous.

Id., 100 S. Ct. at 890-91, 63 L.Ed.2d 154.

While "OSHA inspectors cannot be present around the clock in every workplace," *Whirlpool*, 445 U.S. at 13, 100 S. Ct. at 891, 63 L.Ed.2d 154, there is nothing in *Whirlpool*, or any other decision of this Court, which suggests that the Act is a mere suggestion of good practice to the responsible governmental entities. Instead, the Federal OSHA Act is "safety legislation [that] is to be liberally construed to effectuate the congressional purpose." *Id.* at 13, 100 S.Ct. at 891, 63 L.Ed.2d 154. Thus, despite what the Supreme Court of North Carolina may think about occupational safety and health legislation, Congress had no notion of benefitting only the public at large. The OSHA legislation focuses on the rights and interests of individuals in the workplace.

Of the lower courts, the United States Court of Appeals for the First Circuit has been the most faithful to these propositions. It has followed *Whirlpool* in holding that the federal OSHA legislation is "a remedial statute . . . to be liberally construed in favor of its intended beneficiaries." *Practico v. Portland Terminal Co.*, 783 F.2d 255, 261 (1st Cir. 1985). In *Irving v. United States*, No. 96-2368, 1998 WL 152941 (1st Cir. (N.H.), April 8, 1998), that court affirmed the decision of the United States District Court for the District of New Hampshire and held that the United States can be liable for negligent inspections by OSHA compliance officers operating under the auspices of the United States Department of Labor.

The Federal OSHA inspectors in *Irving* had visited the plaintiff's place of employment in a Somerset, New Hampshire shoe factory on more than one occasion during the late 1970's. Yet, their negligent inspections failed to disclose that the plaintiff was working in close proximity to a hazardous machine in violation of OSHA standards. On 10 October 1979, the plaintiff's hair came in contact with equipment and scalped her, resulting in gruesome and permanent injuries.[4]

The *Irving* court rejected the argument that claims arising out of negligent OSHA inspections fell outside the scope of FTCA liability as being uniquely governmental functions with no private analogy. There was simply no "general exemption [under the Federal Tort Claims Act] that immunizes conduct in the course of federal regulatory inspection." *Irving*, 1998 WL at 13. Thus, the court stated as follows:

> We conclude that, standing alone, a tortfeasor's uniquely governmental purpose in undertaking to act is insufficient to remove the challenged conduct from the scope of the FTCA's waiver of sovereign immunity, and that the pertinent inquiry . . . is whether state law makes a private individual (not the state or other political entity) liable for the asserted failure to exercise due care under similar (not identical) circumstances.

Id. at 22.

There is no suggestion in *Irving*, or in any cases that plaintiffs' research has disclosed involving claims brought under the FTCA for negligent governmental inspections, that the government is immunized because there is no identical conduct counterpart in private life. Rather, the pertinent decisions of this Court are to the contrary. In

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[4] Despite having filed her claim in the early 1980's, the plaintiff's action was not finally adjudicated until 1998, as it wound its way up and down the First Circuit appeal process. *See, e.g., Irving v. United States*, 909 F.2d 598 (1st Cir. 1990).

Indian Towing Co. v. United States, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955), the United States Coast Guard was held liable for the negligent maintenance of a light house. There, this Court rejected the proposition that the federal goevrnment, when acting in a "uniquely governmental" capacity, was somehow immune from liability merely because private persons do not operate coast guards.

The question then arises whether an immunity available to a state entity under state law would also be available to the Federal Government under the FTCA. In short, can the United States invoke a state public duty doctrine to protect itself? That question was answered in the negative in *Rayonier Incorporated v. United States*, 352 U.S. 315, 77 S.Ct. 374 (1957). There, the plaintiffs sued the United States "for losses which they alleged were caused by the negligence of employees of the United States in allowing a forest fire to be started on Government land and in failing to act with due care to put this fire out." *Id.* at 315, 77 S.Ct. at 375. The facts forming liability were that the United States had permitted a railroad to run through its land. An engine gave off sparks that, in turn, ignited fires causing the plaintiffs to sustain property damage. The plaintiffs alleged that the Forest Service, which took "exclusive direction and control of all fire suppression activities," *id.*, did not exercise reasonable care in doing so, thereby failing to prevent the fires and, once they occurred, failing to quench them. *Id.* at 316-17, 77 S.Ct. at 375.

The District Court and Circuit Court of Appeals rejected plaintiffs' claims. This Court reversed. It characterized the Government's meritless argument as follows:

> [The Government argues that the FTCA only] imposes liability on the United States under circumstances where governmental bodies have traditionally been responsible for the misconduct of their employees and neither the common law nor the law of

> Washington imposes liability on municipal or other local governments for the negligence of their agents acting in the 'uniquely governmental' capacity of public firemen.

Id. at 318-19, 77 S. Ct. at 376-77.

The Court would not accept this argument.

> [A]s we recently held in *Indian Towing Co. v. United States,* 350 U.S. 61, 76 S.Ct. 122, the test established by the Tort Claims Act for determining the United States' liability is whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred. We expressly decided in *Indian Towing* that the United States' liability is not restricted to the liability of a municipal corporation or other public body and that an injured party cannot be deprived of his rights under the Act by resort to an alleged distinction, imported from the law of municipal corporations, between the Government's negligence when its acts in a "proprietary" capacity and its negligence when it acts in a "uniquely governmental" capacity.

Id. at 318-19, 77 S.Ct. at 376-77 (footnote omitted). Thus, this Court has rejected the notion that there is a "public duty doctrine" available to protect the United States either under the FTCA itself, *see Indian Towing*, or where the jurisdiction whose substantive tort law governs the underlying claim recognizes such a defense for the governmental activities of the State. *See Rayonier.*

Irving harmonized these concepts and applied them to allow recovery from the United States for Federal OSHA's negligence in the occupational safety and health context. Obviously, the duty to inspect in *Irving* arose under the Federal OSHA Act; it is what put the inspector in the Somerset plant in the first place. In addition, while the "law of the State where the challenged conduct occurred is the only controlling authority as to the question of negligence," *Irving*, 1998 WL 152941 at 16, the duty

arising under federal law is "evidence of the scope of the duty owed to the . . . claimant under state tort law." *Id.* at 17. "[A]lthough a federal duty may govern the conduct of a governmental employee in a given circumstance, a state-law duty may very well arise in consequence of the activity itself." *Id.* at 18. Because private persons undertaking workplace inspections have the duty to fulfill that undertaking in the exercise of reasonable care, *id.*, the government, when fulfilling the same function, has the duty to do so as well:

> [H]aving exercised its authority under the OSH Act to promulgate regulations and standards defining what constitutes workplace safety, and having undertaken the role of determining whether a workplace compiles with those standards, OSHA and its employees are not thereby free to determine compliance in a negligent manner.

Id. at 24.[5] *Irving* thus makes it clear that certain people, like the plaintiff in *Irving* and the claimants here, are entitled to recover as "foreseeable plaintiff[s] within the orbit of risk created by the negligence of the OSHA compliance officers." *Id.* at 35.

Irving is not the only decision addressing the scope and importance of duties to individual workers under the Federal OSHA Act and related legislation. The Third Circuit, and various districts operating within it, also take seriously the statutory mandate. "In light of the OSH Act's broad remedial purpose, the Act and regulations issued pursuant to it should be liberally construed so as to afford the broadest possible protection to workers." *E&R Erectors, Inc. v. Secretary of Labor*, 107 F.3d 157 (3rd Cir. 1997) (citing *Whirlpool*, *supra*, 445 U.S. at

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[5] Notably, the *Irving* Court did not import the public duty doctrine from New Hampshire law. Like North Carolina, New Hampshire recognizes the doctrine as a means to protect governmental entities from liability for their negligence. *Hartman v. Town of Hooksett*, 488 A.2d 12 (N.H. 1984) (adopting the public duty doctrine).

12-13, 100 S.Ct. at 590-91, 63 L.Ed.2d 154). In *Blessing v. United States*, 447 F. Supp. 1160 (E.D. Pa. 1978) the United States District Court for the Eastern District of Pennsylvania considered a suit that arose out of the negligent inspection of work sites by Federal OSHA. The court stated as follows:

> In order to place the governmental inspections challenged in these cases in their proper statutory setting, we observe that the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 [hereinafter "Act"], was enacted for the purpose of reducing nationwide the number and severity of work-related illnesses and injuries—just the sort of injuries suffered by the plaintiffs in these cases. Recognizing the national scope of the health and safety problem it confronted and the human and economic cost that existing conditions imposed, Congress established a comprehensive program of regulation, research and education that calls for the cooperation of and assumption of responsibilities by employers, employees, and both federal and state agencies.

Id. at 1165 (brackets in the original; footnotes omitted).

The *Blessing* plaintiffs did not claim a private right of action against the United States under the OSH Act itself. *Id.* at 1166; *See also, Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). Rather, their position was as follows:

> [P]laintiffs' claims center on principles of common law tort, made applicable to claims against the United States by the FTCA, whereby one is rendered liable to another for breach of a duty voluntarily assumed by affirmative conduct, even when that assumption of duty is gratuitous. *See* Restatement (Second) of Torts §§ 323, 324A (1965). Succinctly put, it is their contention that, having undertaken to make particular inspections pursuant to the Occupational Safety and Health Act, the government assumed a duty to plaintiffs not to conduct those inspections negligently.

Id. at 1166. After determining that these suits where not barred by the discretionary function exception to the Federal Tort Claims Act, *id.* at 1167-86, the *Blessing* court went on to determine that plaintiffs had stated a claim upon which relief can be granted. *Id.* at 1200.

These cases make clear that federal OSHA authorities do have duties, given them by the Act and regulations promulgated thereunder, and that these duties are owed to individual workers. Under appropriate circumstances, therefore, individual workers injured by the government's negligent performance of these duties may recover in tort against the government under the FTCA. The government is not immunized by doctrines like the public duty doctrine and the discretionary function exception.

The key to this case is the proposition that defendants can have no lesser duties than the federal government would have if it were operating the occupational safety and health program in North Carolina. 29 U.S.C.S. § 667 (1990). Otherwise, the tort law incentive to exercise reasonable care would disappear, and the workers of North Carolina would be exposed to greater risk than workers under federally supervised OSHA programs. *See, e.g., Prosser and Keeton on Torts*, § 1, at 5-7; § 85 (5th Ed. 1984) (discussing the policies underlying tort law, including allocation of the risk to a blameworthy party). Moreover, injured North Carolina workers would be deprived of remedies that would be available against Federal OSHA for negligence in its inspection activities, *see Irving*, and there would be no state law equivalent under which to shift the risk of loss. Since the public duty doctrine is unavailable to the United States Department of Labor under *Indian Towing* and *Rayonier*, it cannot be available to shield state OSHA authorities from all liability for negligent malfeasance or nonfeasance. This is so in order to provide an equivalent level of protection, both at the enforcement and at the remedial stage, under both State and Federal OSHA programs, as required by 29 U.S.C.S. § 667.

The North Carolina Supreme Court's decision to the contrary must, therefore, be reversed as contrary to federal law and antithetical to Congress's intent when it passed the Federal OSHA Act.

II. THIS CASE SHOULD BE REMANDED TO THE SUPREME COURT OF NORTH CAROLINA FOR FURTHER CONSIDERATION NOT INCONSISTENT WITH THE PROPOSITION THAT FEDERAL LAW PRECLUDES APPLICATION OF THE PUBLIC DUTY DOCTRINE TO BAR PLAINTIFFS' CLAIMS.

North Carolina tort law holds both governmental and private parties liable for negligently failing to take mandated action to ensure the safety of third parties, even where the negligence of others is also present. Thus, the Federal OSHA inspection duty to individual workers can result in tort liability to those workers who are injured by the negligent performance of those inspection duties.

A. Liability exists for failure to take adequate steps where there is a duty to prevent injury.

In *Jordan v. Jones*, 314 N.C. 106, 331 S.E.2d 662 (1985), the evidence showed that although a number of vehicular accidents had occurred at a particular intersection, the North Carolina Department of Transportation failed to erect a caution light. Another collision ensued at the intersection when a bus driver failed to stop at the stop sign, giving rise to the lawsuit. Because the forecast of evidence showed that the Department of Transportation had failed to erect proper signals, summary judgment in its favor was held improper. *Id.* at 109, 331 S.E.2d at 664. Among the bases for the State's liability was its deviation from the federal standard of care set forth in the *Manual of Uniform Traffic Control Devices*, published by the U.S. Department of Transportation, Federal Highway Administration. *Id.* at 109, 331 S.E.2d at 664. Consequently, governmental negligence in failing to com-

ply with federal standards concerning the safety of third persons is actionable in North Carolina. Liability of that sort was only avoided in this case because the Supreme Court of North Carolina decided, contrary to federal law and under the public duty doctrine, that State OSHA authorities had no duty to individual workers.[6]

B. Liability exists in tort for breach of a duty to inspect created by contract.

Liability for negligence in the inspection context may also be present where the duties arise under contract. North Carolina recognizes that the "duty of care, as an essential part of actionable negligence, . . . may and frequently does arise out a contractual relationship, the theory being that accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and that a negligent performance constitutes a tort as well as breach of contract." *Pinnix v. Toomey*, 242 N.C. 358, 362, 87 S.E.2d 893, 898 (1955) (citing 38 Am. Jur. Negligence § 20). While any duty created by a contract flows to the parties thereto, it extends to foreseeable third parties as well. *Davidson and Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 667, 255 S.E.2d 580, 584 (1979).

Contracts often create a duty to inspect properly for the benefit of a third party. For example in *Olympic Products Co. v. Roof Systems, Inc.*, 88 N.C. App. 315, 363 S.E.2d 367 (1988), a property owner was entitled to recover for negligent inspection. A roof manufacturer contracted with a roofing installer to inspect the installed roof at the owner's premises to insure that the manu-

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[6] *Stone* called *Jordan* into question on the one hand, (App. at 8a), but on the other held that it was not changing the law with respect to established doctrine. (App. at 12a). This situation further argues for this Court determining that a federal duty exists, then remanding for further consideration as to the consequences of that duty in tort under state law.

facturer's warranty would apply. *Id.* at 321, 363 S.E.2d at 371. When the improper installation of the roof caused damage to the plaintiff's building, the plaintiff was entitled to recover from the manufacturer for its failure properly to inspect and to require repairs to the roof. *Id.* at 324, 363 S.E.2d at 373.

Similarly, North Carolina has also recognized that citizens of a town may sue a water supply company for the damage based on that company's contract with their town. *Gorrell v. Greensboro Water Supply Co.*, 124 N.C. 328, 32 S.E. 720 (1899). In *Gorrell*, the Court recognized that although the contract in question was between the city and the company, its object was "the comfort, ease and security from fire of the people, the citizens of Greensboro." *Id.* at 333, 32 S.E. 720. The water company's duty of care flowed to the affected citizens.

> The water company did not covenant to prevent the occurrence of fires, nor that the quantity of water agreed to be furnished would be a certain and effectual protection against every fire, and consequently does not in any sense occupy the attitude of an insurer; but it did undertake to perform the plain and simple duty of keeping water up to a designated height in the standpipe.

Gorrell, 124 N.C. at 337, 32 S.E. 720 (quoting *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340 (1889)).

By voluntarily accepting the responsibilities imposed by the Federal OSHA Act, defendants entered into a relationship with plaintiffs similar to the roofing manufacturer's relationship to the building owner in *Olympic Products* or the water company's relationship to the city residents in *Gorrell*. North Carolina accepted, on defendants' behalf, the federal mandate that the State OSHA program provide standards and enforcement no less effective than that provided by the federal OSHA program. By accepting this responsibility, North Carolina had a

continuing contractual or quasi-contractual duty to "perform with ordinary care the thing agreed to be done." *Pinnix*, 242 N.C. at 362, 87 S.E.2d at 898.

C. Liability exists for an undertaking to provide a benefit to others.

In North Carolina, the consequences of a defendant's voluntary undertakings are actionable in tort. It is widely recognized that:

> [o]ne who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to perform his undertaking.

Restatement (Second) of Torts § 324A (1965).[7] North Carolina has adopted this section of the Restatement. *See Mozingo v. Pitt County Memorial Hospital*, 101 N.C. App. 578, 587, 400 S.E.2d 747, 752 (1991); *Ingle v. Allen*, 71 N.C. App. 20, 26, 321 S.E.2d 588, 594 (1984); *Quail Hollow East Condominium Ass'n. v. Donald J. Scholz Co.*, 47 N.C. App. 518, 522, 268 S.E.2d 12, 15 (1980). In addition to the foregoing factors considered in the Restatement, North Carolina also inquires as to the defendant's intention to benefit a third party, the foreseeability of harm, the degree of certainty that injury has been suffered, the closeness of connection between the defendant's conduct and the injury, the blame attached to the conduct, and the policy of preventing future harm. *Ingle v. Allen*, 71 N.C. App. 20, 27, 321 S.E.2d 588, 594 (1984). Under *Ingle*, defendants' conduct is actionable. Each of the factors to be "balanced" under *Ingle* calls for imposing liability here.

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[7] This doctrine has been described, in its various forms, as the "Good Samaritan doctrine." It provided a basis for negligence liability under New Hampshire law in *Irving*. Given the difference from state to state, plaintiffs have elected to discuss this line of cases as a function of North Carolina law.

Defendants clearly undertook for the protection of workers in North Carolina when they accepted the responsibilities set forth in the Federal OSHA Act and OSHANC. That undertaking required defendants to act with reasonable care to discharge their responsibilities. They egregiously failed to do so.

III. THE QUESTION PRESENTED IS OF NATIONAL SIGNIFICANCE BECAUSE IT AFFECTS EVERY STATE OSHA PROGRAM.

If federal law imposes a duty, there is no federal governmental immunity simply because the actor is engaged in a "uniquely governmental function." Instead, the federal government would be liable in tort under the forum state's substantive negligence law where private persons would be liable for similar conduct. Under the Federal OSHA Act, the proper federal authorities owe duties to individual workers. States may not under the guise of state-created policies and immunities conclude, as did the Supreme Court of North Carolina, that no duty is owed to individual workers by those who conduct a State OSHA program. To permit states to do this would defeat Congress's intent that State OSHA programs must provide worker protection at least as well as the federal program. It would destroy the national uniformity and minimum worker protection Congress intended to impose. It would permit some states, as North Carolina has demonstrated, to flout their Federal OSHA obligations. Finally, and most profoundly, it would render workers like those injured and killed in the Hamlet fire remediless when OSHA inspectors abjectly fail to perform statutory duties established to protect these very workers from precisely the kind of harm that befell them.

CONCLUSION

The Petition for a Writ of Certiorari should be granted, the decision of the Supreme Court of North Carolina reversed, and the case remanded for further proceedings not inconsistent therewith.

Respectfully submitted.

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APPENDIX

APPENDIX

APPENDIX

[Filed 6 February 1998]

IN THE SUPREME COURT
STATE OF NORTH CAROLINA

No. 81PA97

JANET B. STONE; ANNIE B. LOCKLEAR; MARY BARBARA WASHINGTON; CARRIE M. GALLOPS and WILLIAM E. PEELE, JR., Co-Administrators of the Estate of ROSE GIBSON PEELE; JIMMIE BROADY, Administrator of the Estate of MINNIE THOMPSON; LILLIE B. DAVIS; JOHNNY DAWKINS; SHARON E. TOWNSEND; GEORGIA ANN QUICK; RONALD WAYNE POOL; ALFORENCE ANDERSON, Administrator of the Estate of PEGGY JEAN ANDERSON; DAVID MACK ALBRIGHT, Administrator of the Estate of DAVID MICHAEL ALBRIGHT; FRED ERNEST BARRINGTON, SR. and NELSON BARRINGTON, Co-Administrators of the Estate of JOSEPHINE BARRINGTON; PEARLIE GAGNON, Administratrix of the Estate of JOHN R. GAGNON; MATTIE FAIRLEY; MARTHA WATERS; EVELYN WALL; KENNETH WHITE; CONESTER WILLIAMS; JOHN SANDERS; LARRY BELLAMY, Administrator of the Estate of ELIZABETH ANN BELLAMY; SARAH WILLIAMS; NELSON BARRINGTON and LINDA OWENS, Co-Administrators of the Estate of FRED BARRINGTON, JR.; ADA BLANCHARD; AUDREY SUE SCOTT; LETHA TERRY; ELAINE GRIFFIN; KIM MANGUS; SYLVIA MARTIN; GLORIA MALACHI; ALBERTA MCRAE; SANDRA MCPHAUL; EVANDER LYNCH, Administrator of the Estate of JANICE LYNCH; BERNETTA ODOM; THOMAS OATES, III; KATIE NICHOLSON; PAMELA MOORE; PRISCILLA MURPHY; SALLY MURPHY; NORA BUSH; THOMAS COBLE; BRENDA CHAMBERS, Administratrix of the Es-

tate of ROSIE ANN CHAMBERS; BERNARD CAMPBELL; ROSE CHAPPELL; MARTHA NELSON, Administratrix of the Estate of MARTHA RATLIFF; DEBORAH PITTMAN; ANNETTE PIERCE; ZELDA ROBERTS; RICHARD ROBERTS; CLEO REDDICK; DELORES PAUNCY; BOBBY QUICK; DELORES QUICK; LULA SMITH, Administratrix of the Estate of CYNTHIA RATLIFF; WILLIE QUICK; MARY BRYANT; DONNA BRANCH DAVIS; DORIS BOSTIC; RACHEL INGRAM; RICHARD M. LIPFORD; ALICE S. WEBB, Administratrix of the Estate of JEFFREY A. WEBB; BARBARA SHAW; FLORA C. BANKS, Administratrix of the Estate of MARGARET TERESA BANKS; JAMES THOMAS BANKS; LINDA CAROL ELLISON; PAUL SAUNDERS, Administrator of the Estate of MARY LILLIAN WALL; JOANNE PAGE, Administratrix of the Estate of GAIL VIVIAN CAMPBELL; VELMA BUTLER; ROY FUNDERBURK; MARY SUE RICH, Administratrix of the Estate of DONALD BRUCE RICH; PEGGY BROWN, Administratrix of the Estate of MARY ALICE QUICK; CAROLYN M. RAINWATER; MARGIE MORRISON, Administratrix of the Estate of MICHAEL A. MORRISON; SHERMAN MCDONALD; WILLIAM G. HAMILTON and MARIE A. HAMILTON; BRENDA F. BAILEY; ELTON RAY CAFFERATA; PAMELA S. COOPER; WILLIAM KELLY, JR., Administrator of the Estate of BRENDA GAIL KELLY; CATHERINE DAWKINS, Administratrix of the Estate of PHILIP R. DAWKINS; JEANETTE L. SMITH; RUBY BULLARD SELLERS; REGGIE SMITH; CYNTHIA FAYE GRAHAM; WILLIAM WINSTON SMITH, SR.; WILLIAM NOCONDA SMITH, JR.; BETTY EUBANKS, Administratrix of the Estate of CYNTHIA S. WALL; BETTY B. WHITE; DARRELL LEONARD WILKINS, Administrator of the Estate of ROSE LYNETTE JACOBS WILKINS; ANGELA LYNN COULTER, Administratrix of the Estate of JOSIE MAE COULTER; FELTON ALBERT HATCHER; PATRICIA W. HATCHER; MILDRED LASSITER MOATES; OLIN DELLANO MOATES; GLADYS FAYE NOLAN; RONNIE CARROL

NOLAN; HOMER F. JARRELL, Administrator of the Estate of BERTHA JARRELL; LORETTA SCOTT; LORETTA GOODWIN; BENITA INGRAM; MATTIE P. NICHOLSON; MARY ANN DAIREN; MONICA MCDOUGALD; ALISON GRIFFIN; BRENDA MCDOUGALD; and ROY S. MORRISON, JR.

v.

NORTH CAROLINA DEPARTMENT OF LABOR and NORTH CAROLINA DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH DIVISION

WHICHARD, Justice.

Plaintiffs commenced this negligence action against defendants, the North Carolina Department of Labor and its Occupational Safety and Health Division, pursuant to the Tort Claims Act, N.C.G.S. §§ 143-291 to -300.1 (1993) (amended 1994). Plaintiffs sought damages for injuries or deaths resulting from a fire at the Imperial Foods Products plant in Hamlet, North Carolina. Defendants moved, pursuant to N.C.G.S. § 1A-1, Rules 12(b)(1), (2), and (6), to dismiss plaintiffs' claims. Deputy Commissioner D. Bernard Alston denied the motions. The full Commission affirmed and adopted his decision.

The Court of Appeals affirmed. It held that N.C.G.S. § 95-4, which describes the authority, power, and duties of the Commissioner of Labor, imposed a duty upon defendants to inspect the workplaces of North Carolina and that the breach of this duty gave rise to plaintiffs' action for negligence. *Stone v. N.C. Dep't of Labor*, 125 N.C. App. 288, 291-92, 480 S.E.2d 410, 413 (1997). It further held that the public duty doctrine did not apply to actions brought against the State under the Tort Claims Act. *Id.* at 291, 480 S.E.2d at 412. On 5 June 1997 this Court granted defendants' petition for discretionary review.

Because these claims arise upon defendants' motions to dismiss, we treat plaintiffs' factual allegations, which follow, as true. *See Sorrels v. M.Y.B. Hospitality Ventures of Asheville,* 332 N.C. 645, 646, 423 S.E.2d 72, 72 (1992). On 3 September 1991 a fire started in a hydraulic line near a deep fat fryer in the Imperial Foods Products chicken plant (the plant) in Hamlet, North Carolina. The fire grew in intensity and spread rapidly through the interior of the plant. Plaintiffs are either former employees of Imperial Foods who suffered injury in the fire or personal representatives of the estates of employees who died in the fire. They or their decedents (plaintiffs) were lawfully inside the plant at the time of the fire. Plaintiffs could not easily escape the plant or the fire because the exits in the plant were unmarked, blocked, and inaccessible. After the fire the North Carolina Department of Labor and its Occupational Safety and Health Division (defendants) conducted their first and only inspection in the plant's eleven-year history of operation. As a result of this inspection, defendants discovered numerous violations of the Occupational Safety and Health Act of North Carolina (OSHANC), including the plant's inadequate and blocked exits and inadequate fire suppression system. Defendants issued eighty-three citations against Imperial Foods Products for violations of OSHANC standards. Plaintiffs alleged, *inter alia,* that defendants had a duty under OSHANC to inspect the plant, defendants breached that duty by failing to inspect until after the fire, defendants' breach caused plaintiffs' injuries or deaths, and plaintiffs' injuries or deaths entitle them to damages in tort.

Plaintiffs have asserted a common law negligence action against the State under the Tort Claims Act. To recover damages under the common law of negligence, private parties "must establish (1) a legal duty, (2) a breach thereof, and (3) injury proximately caused by such breach." *Kientz v. Carlton,* 245 N.C. 236, 240, 96 S.E. 2d 14, 17 (1957).

Defendants argue that plaintiffs have failed to state a claim upon which relief can be granted because defendants did not owe a duty to the individual plaintiffs due to the public duty doctrine. This doctrine, articulated in *Braswell v. Braswell,* 330 N.C. 363, 370-71, 410 S.E.2d 897, 901-02 (1991), provides that governmental entities and their agents owe duties only to the general public, not to individuals, absent a "special relationship" or "special duty" between the entity and the injured party. Defendants also contend that because plaintiffs have not stated a claim, the Industrial Commission lacks personal and subject matter jurisdiction over defendants.

The issue, whether the Court of Appeals erred in affirming the Industrial Commission's denial of defendants' motions to dismiss, requires resolution of three sub-issues. First, does the public duty doctrine apply to claims brought under the Tort Claims Act? Second, if it does, does it apply to state agencies like defendants? Finally, if the doctrine applies, does an exception to it apply as well?

The Tort Claims Act provides that the State is liable "under circumstances where [it], if a private person, would be liable to the cliamant in accordance with the laws of North Carolina." N.C.G.S. § 143-291. Defendants recognize that the State, like a private person, may be subject to liability for negligence under the terms of this legislation. They contend, however, that they are not liable to plaintiffs because under the public duty doctrine, they owe no legal duty to the individual plaintiffs. Defendants assert that their obligation under N.C.G.S. § 95-4 to inspect workplaces in North Carolina serves the public at large, not individual employees. *See Braswell,* 330 N.C. at 370-71, 410 S.E.2d at 901. Plaintiffs assert, and the Court of Appeals held, that the public duty doctrine does not apply to bar plaintiffs' claims because it does not apply to the liability of a private person,

and under the Tort Claims Act, the State is liable if a private person would be. We disagree, and we reverse the Court of Appeals.

In construing the Tort Claims Act to determine whether it incorporates the common law public duty doctrine, "our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished." *Electric Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). "Legislative purpose is first ascertained from the plain words of the statute." *Id.* Under the Act the State is liable *only* under circumstances in which a private person would be N.C.G.S. § 143-291.

Private persons do not possess public duties. Only governmental entities possess authority to enact and enforce laws for the protection of the public. *See Grogan v. Commonwealth*, 577 S.W.2d 4, 6 (Ky.) (recognizing that if the State were held liable for a failure to enforce laws and regulations establishing safety standards for construction and use of buildings, the State's *status* as a governmental entity "would be the only basis *for* holding a city or state liable, because only a governmental entity possesses the authority to enact and enforce laws for the protection of the public"), *cert. denied*, 444 U.S. 835, 62 L. Ed. 2d 46 (1979). If the State were held liable for performing or failing to perform an obligation to the public at large, the State would have liability when a private person could *not*. The public duty doctrine, by barring negligence actions against a governmental entity absent a "special relationship" or a "special duty" to a particular individual, serves the legislature's express intention to permit liability against the State only when a private person could be liable. *See Braswell*, 330 N.C. at 370-71, 410 S.E.2d at 901-02. Thus, the plain words of the statute indicate an intent that the doctrine apply to claims brought under the Tort Claims Act.

Our determination of legislative intent is also "guided by . . . certain canons of statutory construction." *Swain Elec. Co.*, 328 N.C. at 656, 403 S.E.2d at 294. Acts, such as the Tort Claims Act, that permit suit in derogation of soverign immunity should be strictly construed. *Floyd v. N.C. State Highway & Pub. Works Comm'n*, 241 N.C. 461, 464, 85 S.E.2d 703, 705 (1955), *overruled in part on other grounds by Barney v. N.C. State Highway Comm'n*, 282 N.C. 278, 284-85, 192 S.E.2d 273, 277 (1972). Statutes in derogation of the common law likewise should be strictly construed. *McKinney v. Deneen*, 231 N.C. 540, 542, 58 S.E.2d 107, 109 (1950).

In passing the Tort Claims Act, the legislature incorporated the common law of negligence. *MacFarlane v. N.C. Wildlife Resources Comm'n*, 244 N.C. 385, 387, 93 S.E.2d 557, 559-60 (1956), *overruled in part on other grounds by Barney*, 232 N.C. at 284-85, 192 S.E. 2d at 277. The public duty doctrine forms an integral part of that common law. *Braswell*, 330 N.C. at 370, 410 S.E.2d at 901. Plaintiffs ask us to construe the Tort Claims Act broadly so as to erase a fundamental common law doctrine. We decline to do so. Until the legislature clearly expresses that immunity is to be waived even in situations in which the common law public duty doctrine would otherwise apply to bar a negligence claim, we construe the Tort Claims Act as incorporating the existing common law rules of negligence, including that doctrine. *See Floyd*, 241 N.C. at 464, 85 S.E.2d at 705; *McKinney*, 231 N.C. at 542, 58 S.E.2d at 109. Any change in the State's sovereign immunity to permit the State to be liable in a situation in which a private person could not should be made by the legislature, not by this Court under the guise of construction.

Plaintiffs argue that even if the public duty doctrine applies to claims brought under the Tort Claims Act, it does not apply in this case. They contend that it applies

only to claims against *local governments* for failure to *prevent crimes.*[1]

When this Court first recognized the public duty doctrine, it discussed the doctrine in terms of the facts before it. *See Braswell,* 330 N.C. at 370, 410 S.E.2d at 901 (addressing the public duty doctrine as it applied to a plaintiff's claims against the Sheriff of Pitt County for failure to provide her with protection). In the context of a claim against a sheriff, we explained that, under the doctrine, "a *municipality* and its agents act for the benefit of the public, and therefore, there is not liability for the failure to furnish *police protection* to specific individuals." *Id.* (emphasis added).

Once this Court recognized the doctrine, however, our Court of Appeals applied it to a variety of local governmental operations. *See, e.g., Simmons v. City of Hickory,* 126 N.C. App. 821, —, 487 S.E.2d 583, 585 (1997) (holding that the public duty doctrine applied to bar claim against city for negligently inspecting home and issuing building permits and stating that "[t]he public duty doctrine has been applied to a variety of statutory governmental duties"); *Sinning v. Clark,* 119 N.C. App. 515, 518, 459 S.E.2d 71, 73 (holding that the public duty doctrine applied to bar a claim against a municipality, the city building inspection and the city code administrator

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1 Plaintiffs also argue that *Jordan v. Jones,* 314 N.C. 106, 331 S.E.2d 662 (1985) (permitting plaintiff to bring a tort action against the Department of Transportation), supports their position that the public duty doctrine does not bar their claim and that they may recover from the State for its negligent failure to take action that could have protected its citizens. *Jordan* was decided before this Court recognized the public duty doctrine in *Braswell,* 330 N.C. at 371, 410 S.E.2d at 902. The Court in *Jordan* did not consider whether plaintiff's claims were barred by the public duty doctrine. Thus, *Jordan* is inapplicable to the question of whether the public duty doctrine applies to claims against the State. Plaintiffs make no argument that the holding and reasoning of *Jordan* fall within one of the exceptions to the public duty doctrine.

for gross negligence in an inspection of a home and stating that this doctrine "has been applied by our [c]ourts to various statutory governmental duties"), *disc. rev. denied*, 342 N.C. 194, 463 S.E.2d 242 (1995); *Davis v. Messer*, 119 N.C. App. 44, 55-56 457 S.E.2d 902, 909 (holding that the public duty doctrine applied to a claim against a fire chief, a fire department, a town, and a county for negligence in their failure to complete their effort to extinguish a fire in plaintiff's home), *disc. rev. denied*, 341 N.C. 647, 462 S.E.2d 508 (1995); *Prevette v. Forsyth County*, 110 N.C. App. 754, 758, 431 S.E.2d 216, 218 (holding that the public duty doctrine applied to bar wrongful death claim againt county and against director and employee of the county animal control shelter for failing to protect plaintiff from dogs which defendants knew were dangerous), *disc. rev. denied*, 334 N.C. 622, 435 S.E.2d 338 (1993). The Court of Appeals has also applied the doctrine to a state agency. *See Humphries v. N.C. Dep't. of Correction*, 124 N.C. App. 545, 547, 479 S.E.2d 27, 28 (1996) (holding that the doctrine barred claim against Department of Correction for alleged negligence in the supervision of a probationer), *disc. rev. improvidently allowed*, 346 N.C. 269, 485 S.E.2d 293 (1997). While this Court has not heretofore applied the doctrine to a state agency or to a governmental function other than law enforcement, we do so now.

The policies underlying recognition of the public duty doctrine in *Braswell* support its application here. In *Braswell* we explained that the doctrine was necessary to prevent "an overwhelming burden of liability" on governmental agencies with "limited resources." *Braswell*, 330 N.C. at 370-71, 410 S.E.2d at 901. We stated:

> "The amount of protection that may be provided is limited by the resources of the community and by a considered legislative-executive decision as to how those resources may be deployed. For the courts to proclaim a new and general duty of protection in the law of tort . . . would inevitably determine how the

> limited police resources . . . should be allocated and without predictable limits."

Id. at 371, 410 S.E.2d at 901 (quoting *Riss v. City of New York*, 22 N.Y.2d 579, 581-82, 240 N.E.2d 860, 860-61, 293 N.Y.S.2d 897, 898 (1968)). Just as we recognized the limited resources of law enforcement in *Braswell*, we recognize the limited resources of defendants here. Just as we there "refuse[d] to judicially impose an overwhelming burden of liability [on law enforcement] for failure to prevent every criminal act," *id.* at 370-71, 410 S.E.2d at 901, we now refuse to judicially impose an overwhelming burden of liability on defendants for failure to prevent every employer's negligence that results in injuries or deaths to employees. "[A] government ought to be free to enact laws for the *public protection* without thereby exposing its supporting taxpayers . . . to liability for failures of omission in its attempt to enforce them. It is better to have such laws, even haphazardly enforced, than not to have them at all." *Grogan*, 577 S.W.2d at 6 (emphasis added).

Further, we do not believe the legislature, in establishing the Occupational Safety and Health Division of the Department of Labor in 1973, intended to impose a duty upon this agency to each *individual* worker in North Carolina. Nowhere in chapter 95 of our General Statutes does the legislature authorize a private, individual right of action against the State to assure compliance with OSHANC standards. Rather, the most the legislature intended was that the Division prescribe safety standards and secure some reasonable compliance through spot-check inspections made "as often as practicable." N.C.G.S. § 95-4(5) (1996). "In this way the safety conditions for work[ers] in general would be improved." *Nerbun v. State*, 8 Wash. App. 370, 376, 506 P.2d 873, 877 (holding that Washington Department of Labor did not owe an absolute duty to individual workers and concluding that the Washington legislature intended only that the

Department act on behalf of workers in general), *disc. rev. denied*, 82 Wash. 2d 1005 (1973).

Because we hold that the legislature intended the public duty doctrine to apply to claims against the State under the Tort Claims Act, we now apply the doctrine to the facts of this case. The general common law rule provides that governmental entities, when exercising their statutory powers, act for the benefit of the general public and therefore have no duty to protect specific individuals. *See Braswell*, 330 N.C. at 370, 410 S.E.2d at 901; *see also DeFusco v. Todesca Forte, Inc.*, 683 A.2d 363, 365 (R.I. 1996) (recognizing that with certain exceptions, "[t]he public duty doctrine shields the state and its political subdivisions from tort liability arising out of discretionary governmental actions that by their nature are not ordinarily performed by private persons"). Because the governmental entity owes no particular duty to any individual claimant, it cannot be held liable for negligence for a failure to carry out its statutory duties. *Braswell*, 330 N.C. at 370, 410 S.E.2d at 901. Absent a duty, there can be no liability. *Kientz*, 245 N.C. at 240, 96 S.E.2d at 17.

In *Braswell* this Court recognized two exceptions to the public duty doctrine "to prevent inevitable inequities to certain individuals." *Braswell*, 330 N.C. at 371, 410 S.E.2d at 901. It explained that exceptions to the doctrine exist: (1) where there is a special relationship between the injured party and the governmental entity; and (2) when the governmental entity creates a special duty by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered. *Id.* These exceptions are narrowly construed and applied. *Id.* at 372, 410 S.E.2d at 902; *see also Sinning*, 119 N.C. App. at 519, 459 S.E.2d at 74.

Plaintiffs assert that defendants owed each claimant a duty under N.C.G.S. § 95-4 to inspect the Imperial Foods

Products plant. This statute provides that the Commissioner of Labor is "charged with the duty" to visit and inspect "at reasonable hours, as often as practicable," all of the "factories, mercantile establishments, mills, workshops, public eating places, and commercial institutions in the State." N.C.G.S. § 95-4(5). It also imposes on the Commissioner a duty to enforce these inspection laws and request prosecution of any violations found. N.C.G.S. § 95-4(6). It creates no private cause of action for individual claimants for violations of OSHANC.

Although N.C.G.S. § 95-4 imposes a duty upon defendants, that duty is for the benefit of the public, not individual claimants as here. *Braswell*, 330 N.C. at 370, 410 S.E.2d at 901. Plaintiffs' claims thus fall within the public duty doctrine, and to state claims for actionable negligence, plaintiffs must allege facts placing the claims within one of the exceptions to the doctrine. They make no such "special relationship" or "special duty" allegations. The claims therefore must fail. *See id.* at 371, 410 S.E.2d at 902.

The dissent asserts that we have eviscerated the Tort Claims Act, nullified it, rendered it obsolete, left it purposeless, absolved the State of all liability, and barred all negligence claims against the State. These assertions are hyperbolic and overwrought. A myriad of reported and unreported cases, covering a great variety of fact situations, have allowed recovery against the State under the Tort Claims Act. Nothing in this opinion even hints at the overruling of those cases. Absent legislative change, the Act functions and will continue to function as it has for almost half a century. We simply hold, with sound reason and substantial grounding in the law of both this and other jurisdictions, that in this limited new context, not heretofore confronted by this Court, the Act was not intended to and does not apply absent a special relationship or special duty.

For the reasons stated, the Court of Appeals erred in affirming the Industrial Commission's denial of defendant's motions to dismiss. The decision of the Court of Appeals is therefore reversed, and the case is remanded to the Court of Appeals for further remand to the Industrial Commission for entry of an order of dismissal.

REVERSED AND REMANDED.

Justice ORR dissenting.

The majority opinion erroneously takes a limited and obscure common law concept, the public duty doctrine, which has traditionally applied only to municipalities and their law enforcement responsibilities, and expands the doctrine's application to effectively eviscerate the Tort Claims Act. As a result, the right of individuals to sue the State for negligent acts committed by the State, a right expressly conveyed by the General Assembly, is nullified without the support of any precedential authority permitting such an indulgence. Therefore, I dissent for the reasons which follow.

The recognition of the public duty doctrine in this country is traced to an 1855 decision of the United States Supreme Court. *South v. Maryland,* 59 U.S. 396, 15 L. Ed. 433 (1855). The case involved a negligence suit brought by plaintiffs to recover against a sheriff and his sureties on an official bond for failure to keep the peace and protect the plaintiffs. The Court stated:

> Actions against the sheriff for a breach of his ministerial duties in the execution of process are to be found in almost every book of reports. But no instance can be found where a civil action has been sustained against him for his default or misbehavior as conservator of the peace, by those who have suffered injury to their property or persons through the violence of mobs, riots, or insurrections.

In reviewing this seminal decision and other authorities, I can find no common law basis for the majority taking the public duty doctrine beyond the original bounds of local law enforcement. In *South,* where the doctrine first originated, the public duty doctrine was applied to address only municipalities and law enforcement. This was also the case in *Braswell v. Braswell,* 330 N.C. 363, 410 S.E.2d 897 (1991), where this Court first adopted the public duty doctrine. In *Braswell,* the doctrine was again

only applied to factors involving a municipality and law enforcement. There, Justice Meyer, writing for a unanimous Court, explained:

> The general common law rule, known as the public duty doctrine, is that a municipality and its agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish police protection to specific individuals.

Id. at 370, 410 S.E.2d at 901. Neither *South* nor *Braswell* justify the majority's sudden expansion or enlargement of the doctrine to situations beyond local law enforcement. No mention is made or reference cited by the majority which authorizes this extension, and no common law authority is offered. This judicial amplification, therefore, is not justified, and to the extent that other state jurisdications have bent and skewed the common law to expand the doctrine, we cannot, and should not, follow such an ill-advised course.

Prior to the Tort Claims Act, the State and its agencies were immune from tort liability under the doctrine of sovereign immunity. *Gammons v. N.C. Dep't of Human Resources,* 344 N.C. 51, 54, 472 S.E.2d 722, 723-24 (1996). This common law doctrine of immunity extended protection to government entities for liability for injuries caused by government acts no matter how wanton or reckless the government's conduct. *Davis v. Messer,* 119 N.C. App. 44, 52, 457 S.E.2d 902, 907, *disc. rev. denied,* 341 N.C. 647, 462 S.E.2d 508 (1995); *Wiggins v. City of Monroe,* 73 N.C. App. 44, 49, 326 S.E.2d 39, 43 (1985). When the General Assembly enacted the Tort Claims Act in 1951, it partially waived or eliminated the State's sovereign immunity by allowing actions to be brought against the State in cases where negligence was committed by its employees in the course of their employment. *Gammons,* 344 N.C. at 54, 472 S.E.2d at 723-24. The purpose and effect of the Act was to remove the blanket immunity traditionally enjoyed by the State

under the English common law and permit injured persons to recover against the State for negligent acts, *Lyon & Sons, Inc. v. N.C. State Bd. of Educ.*, 238 N.C. 24, 27, 76 S.E.2d 553, 555 (1953), or omissions, *Phillips v. N.C. Dep't of Transp.*, 80 N.C. App. 135, 341 S.E.2d 339 (1986) (1977 amendment to the Act extended State's liability to include negligent omissions). To ensure this, the legislature made the Act expressly provide that the State is liable "under circumstances where [it], if a private person, would be liable to the claimant in accordance with the laws of North Carolina." U.C.G.S. § 143-291(a) (1996).

In the case *sub judice*, plaintiffs assert negligence claims against the State for its alleged failure to inspect the Imperial Foods Products plant. The public duty doctrine, as enunciated in *Braswell*, does not apply in this case because here: (1) the suit is against the State, not a municipality as in *Braswell*; and (2) the suit involves failure to inspect, not failure to provide police protection as in *Braswell*. Enlarging the doctrine as the majority does in this case means that it will be extended beyond its traditional realm of protecting local law enforcement and will apply to circumstances outside those identified in *Braswell*. The public duty doctrine, moreover, should not be applied here because, unlike in *Braswell*, this suit was brought under the Tort Claims Act. The public duty doctrine should not be used to *grant the State immunity* when the express intent of the Tort Claims Act was to *remove immunity* and make the State liable for its wrongs. Granting immunity to the State under the public duty doctrine makes the Tort Claims Act virtually obsolete. Thus, not only does *Braswell* not justify extending immunity, but the specific language and underlying policy of the Tort Claims Act precludes such an expansion.

The majority, however, attempts to justify its decision on the grounds that the public duty doctrine applies be-

cause: (1) The Tort Claims Act requires the State to be treated like a private person and private persons do not have public duties; (2) The Tort Claims Act incorporates the common law and therefore incorporates the public duty doctrine; (3) the *Braswell* policies support application of the doctrine; and (4) Under OSHANC, the General Assembly never intended for a duty to be imposed. All of these arguments are untenable.

First, it is patently unreasonable to interpret the Act's requirement that the State be treated like a private person as absolving the State of all liability. The very reason for this language is to eliminate the common law doctrine of sovereign immunity. The intent is to allow an individual to assert a suit against the State, the same suit an individual could assert against a private person or entity. The legislative intent of the Act was not to take this right away, especially since there was no liability to take away when this language was chosen and the Act adopted. If the language concerning treatment like a private person had been intended to mean what the majority says it means, i.e., that the State receives immunity, the Act would have no purpose. If that had been the case, the legislature could have just left sovereign immunity in place.

In addition to clashing with the intent of the Act, the majority's interpretation of this language also approves an oblique reading of the Act which necessitates a kind of acrobatic reasoning. The majority asserts that the legislative request to treat the State as a private person really means that the State has immunity. This does not make sense. The legislature did not intend to be so obtuse as to ostensibly take immunity away from the State, yet by including language requiring treatment like a private person, grant it back that very same immunity under the public duty doctrine. Such reasoning would require the Court to read between the lines and discover a whole line of reasoning in the one sentence innocuously address-

ing treatment like a private person. If the legislature had intended to grant the State immunity by requiring that it be treated like a private person it could have simply said such.

The majority's second argument, that the Act incorporates the public duty doctrine because it incorporates the common law, is also erroneous. As previously noted, the public duty doctrine originated in the United States Supreme Court case *South v. Maryland,* 59 US.. 396, 15 L. Ed. 433 (1855). Thereafter, "the public duty doctrine was widely accepted by most state courts." *Ezell v. Cockrell,* 902 S.W 2d 394, 397 (Tenn. 1995). When most states abolished sovereign immunity by statute, the doctrine came under attack. *Id.* at 398. Some state courts abolished the doctrine, arguing that it was simply sovereign immunity under another guise and to apply it was inconsistent with statutes that eliminated immunity. *Id.* Other states, such as Georgia, limited the application of the public doctrine to apply only in situations involving police protection. *Hamilton v. Cannon,* 267 Ga. 655, 482 S.E.2d 370 (1997).

In North Carolina, the common law tradition of the public duty doctrine was never extended by this Court beyond its limited application to municipalities and law enforcement. Second, the North Carolina legislature has never adopted or recognized the public duty doctrine. In fact, this Court only recognized the doctrine for the first time in 1991, and only then, the Court recognized the defense in the most narrow of terms. To argue, as the majority does, that by enacting the Tort Claims Act in 1951, the Legislature somehow incorporated the expansive public duty doctrine enunciated by the majority is at best, simply wrong.

In its third argument, the majority asserts that the *Braswell* rationale of preventing enormous liability on agencies with limited resources applies here as well. This

is misplaced. First, damages are capped under the Tort Claims Act. The "General Assembly amended N.C.G.S. § 143-291(a) so that damages are capped at $150,000 for causes arising on or after 1 October 1994." *Parham v. Iredell County Dept. of Social Services,* 127 N.C. App. 144, ——, 489 S.E.2d 610, 613 (1997). Thus, the majority's fear of an "overwhelming burden of liability" has already been directly addressed by the General Assembly which has chosen, in its legislative capacity, to limit liability as it deemed necessary.

Also, the potential for liability and circumstances in *Braswell* and in this case are very different. In *Braswell,* there was a potential for overwhelming and unlimited liability because the plaintiff was claiming that the police failed to protect her from an unpredictable criminal act. If the police could be liable for such failures, the city would endure enormous liability for all criminal acts it allegedly failed to prevent. In this case, we are dealing with inspections which are required to be carried out on a regular, predictable basis. Here, the duty to perform is clearly set out and can be accomplished. It is feasible. Also, although there may be the inclination to protect the State from suit, this case does not involve determining how "limited police resources should be allocated," as was the issue in *Braswell. Braswell,* 330 N.C. at 371, 410 S.E.2d at 901. Instead, this case is more similar to what we differentiated in *Braswell,* where we stated that dealing with police resources was "quite different from the predictable allocation of resources and liabilities when public hospitals, rapid transit systems, or even highways are provided." *Id.* at 371, 410 S.E.2d at 901-02. Thus, the policies articulated in *Braswell* are also inapplicable.

The fourth and final argument offered by the majority is that OSHANC did not impose a duty to conduct investigations. This is incorrect because N.C.G.S. § 95-4 provides that the Commissioner of Labor is *"charged with*

the duty" to visit and inspect the factories for violations. It is unlikely that the legislature intended inspections only "as often as practicable," as the majority asserts, when it used such express language and included an extended list of requirements or actions that the Commissioner was required to take in order to fulfill this mandated duty.

It must be emphasized that the legislature, by removing sovereign immunity, made a policy decision to allow negligence suits against the state under circumstances and limitations imposed by the Tort Claims Act. Likewise, to the extent the legislature wants to limit lawsuits in the future which are similar to the one before us, it can certainly amend the Act—or abolish it altogether and reimpose sovereign immunity. It is unnecessary and inappropriate for this Court to become the protector of the legislative treasury by undoing what the representatives of the public voted to accomplish.

Finally, it should be noted that other commentators have recognized the many valid, cogent arguments which have been made against extending the public duty doctrine to cases such as this one. As one author noted in his critique of the doctrine.

> [f]irst, the application of the doctrine allows governmental entities to use the shield of sovereign immunity when the legislature no longer mandates such immunity. Second, the application of the doctrine requires that plaintiffs injured by a negligent official suffer solely because of the governmental status of the tortfeasor. Third, the application of the doctrine promotes incompetence by providing no meaningful incentive for the governmental entity to provide the services of optimal quality. Fourth, even with the elimination of the doctrine, plaintiffs must still prove breach of duty, causation, and damages; a vigorous task just like in any other negligence action. Finally, the wide availability of liability insurance allows a

> governmental entity limited to pecuniary exposure while still compensating the injured individual.

Frank Swindell, *Municipal Liability for Negligent Inspections* in Sinning v. Clerk—*A "Hollow" Victory for the Public Duty Doctrine,* 18 Campbell L. Rev. 241, 250-51 (1996). Moreover, other writers have noted that many "jurisdictions [have] abrogated the doctrine of sovereign immunity because of the degree of injustice it caused." John Cameron McMillan, Jr., Note, *Government Liability and the Public Duty Doctrine,* 32 Vill. L. Rev. 505, 529 (1987). By resurrecting sovereign immunity in the guise of the public duty doctrine, the majority perpetuates this injustice and disregards the mandate of the Tort Claims Act to protect injured citizens from government negligence.

Justice FRYE joins in this dissenting opinion.

Feb. 4, 1997

COURT OF APPEALS OF NORTH CAROLINA

No. COA96-207

JANET B. STONE; ANNIE B. LOCKLEAR; MARY BARBARA WASHINGTON; CARRIE M. GALLOPS and WILLIAM E. PEELE, JR., Co-Administrators of the Estate of ROSE GIBSON PEELE; JIMMIE BROADY, Administrator of the Estate of MINNIE THOMPSON; LILLIE B. DAVIS; JOHNNY DAWKINS; SHARON E. TOWNSEND; GEORGIA ANN QUICK; RONALD WAYNE POOL; ALFORENCE ANDERSON, Administrator of the Estate of PEGGY JEAN ANDERSON; DAVID MACK ALBRIGHT, Administrator of the Estate of DAVID MICHAEL ALBRIGHT; FRED ERNEST BARRINGTON, SR. and NELSON BARRINGTON, Co-Administrators of the Estate of JOSEPHINE BARRINGTON; PEARLIE GAGNON, Administratrix of the Estate of JOHN R. GAGNON; MATTIE FAIRLEY; MARTHA WATERS; EVELYN WALL; KENNETH WHITE; CONESTER WILLIAMS; JOHN SANDERS; LARRY BELLAMY, Administrator of the Estate of ELIZABETH ANN BELLAMY; SARAH WILLIAMS; NELSON BARRINGTON and LINDA OWENS, Co-Administrators of the Estate of FRED BARRINGTON, JR.; ADA BLANCHARD; AUDREY SUE SCOTT; LETHA TERRY; ELAINE GRIFFIN; KIM MANGUS; SYLVIA MARTIN; GLORIA MALACHI; ALBERTA MCRAE; SANDRA MCPHAUL; EVANDER LYNCH, Administrator of the Estate of JANICE LYNCH; BERNETTA ODOM; THOMAS OATES, III; KATIE NICHOLSON; PAMELA MOORE; PRISCILLA MURPHY; SALLY MURPHY; NORA BUSH; THOMAS COBLE; BRENDA CHAMBERS, Administratrix of the Estate of ROSIE ANN CHAMBERS; BERNARD CAMPBELL;

ROSE CHAPPELL; MARTHA NELSON, Administratrix of the Estate of MARTHA RATLIFF; DEBORAH PITTMAN; ANNETTE PIERCE; ZELDA ROBERTS; RICHARD ROBERTS; CLEO REDDICK; DELORES PAUNCY; BOBBY QUICK; DELORES QUICK; LULA SMITH, Administratrix of the Estate of CYNTHIA RATLIFF; WILLIE QUICK; MARY BRYANT; DONNA BRANCH DAVIS; DORIS BOSTIC; RACHEL INGRAM; RICHARD M. LIPFORD; ALICE S. WEBB, Administratrix of the Estate of JEFFREY A. WEBB; BARBARA SHAW; FLORA C. BANKS, Administratrix of the Estate of MARGARET TERESA BANKS; JAMES THOMAS BANKS; LINDA CAROL ELLISON; PAUL SAUNDERS, Administrator of the Estate of MARY LILLIAN WALL; JOANNE PAGE, Administratrix of the Estate of GAIL VIVIAN CAMPBELL; VELMA BUTLER; ROY FUNDERBURK; MARY SUE RICH, Administratrix of the Estate of DONALD BRUCE RICH; PEGGY BROWN, Administratrix of the Estate of MARY ALICE QUICK; CAROLYN M. RAINWATER; MARGIE MORRISON, Administratrix of the Estate of MICHAEL A. MORRISON; SHERMAN MCDONALD; WILLIAM G. HAMILTON and MARIE A. HAMILTON; BRENDA F. BAILEY; ELTON RAY CAFFERATA; PAMELA S. COOPER; WILLIAM KELLY, JR., Administrator of the Estate of BRENDA GAIL KELLY; CATHERINE DAWKINS, Administratrix of the Estate of PHILIP R. DAWKINS; JEANETTE L. SMITH; RUBY BULLARD SELLERS; REGGIE SMITH; CYNTHIA FAYE GRAHAM; WILLIAM WINSTON SMITH, SR.; WILLIAM NOCONDA SMITH, JR.; BETTY EUBANKS, Administratrix of the Estate of CYNTHIA S. WALL; BETTY B. WHITE; DARRELL LEONARD WILKINS, Administrator of the Estate of ROSE LYNETTE JACOBS WILKINS; ANGELA LYNN COULTER, Administratrix of the Estate of JOSIE MAE COULTER; FELTON ALBERT HATCHER; PATRICIA W. HATCHER; MILDRED LASSITER MOATES; OLIN DELLANO MOATES; GLADYS FAYE NOLAN; RONNIE CARROL NOLAN; HOMER F. JARRELL, Administrator of the Es-

tate of BERTHA JARRELL; LORETTA SCOTT; LORETTA GOODWIN; BENITA INGRAM; MATTIE P. NICHOLSON; MARY ANN DAIREN; MONICA MCDOUGALD; ALISON GRIFFIN; BRENDA MCDOUGALD; and ROY S. MORRISON, JR.,

Plaintiffs,

v.

NORTH CAROLINA DEPARTMENT OF LABOR and NORTH CAROLINA DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH DIVISION,

Defendants.

LEWIS, Judge.

Plaintiffs commenced this action under the Tort Claims Act, N.C. Gen.Stat. section 143-291 et. seq., for damages incurred as a result of a 3 September 1991 fire at the Imperial Food Products plant ("the plant") in Hamlet. Plaintiffs allege that defendants negligently failed to inspect the plant for workplace safety violations and failed to enforce workplace safety laws. Defendants moved to dismiss the claims under N.C.R. Civ. P. 12(b)(6) for failure to state a claim and under N.C.R. Civ. P. 12(b)(1) and (2) on the basis of sovereign immunity. Deputy Commissioner D. Bernard Alston denied defendants' motions. The full Commission affirmed and adopted the Deputy Commissioner's decision. Defendants appeal.

Since we are reviewing a ruling on a motion to dismiss, we treat plaintiffs' allegations as true. *See Harris v. NCNB*, 85 N.C.App. 669, 670, 355 S.E.2d 838, 840 (1987). Plaintiffs allege that on 3 September 1991, a hydraulic fuel line near a deep fat fryer in the processing section of the plant ruptured, igniting hydraulic fuel from a natural gas fume cooker. The fire spread rapidly through the plant, killing twenty-five (25) people and injuring fifty-six (56). Defendants had never inspected the plant, despite the occurrence of two other fires at the plant, one in 1980 and another in 1983. When it was

inspected subsequent to the fire in September 1991, the plant was issued eighty-three (83) citations for various violations of the Occupational Safety and Health Act of North Carolina. Plaintiffs allege, inter alia, that defendants' failure to inspect the plant was negligent.

As a preliminary matter, we note that ordinarily, the denial of a motion to dismiss is not immediately appealable. *E.g. Godwin v. Walls,* 118 N.C.App. 341, 344, 455 S.E.2d 473, 477 (1995). However, since defendants' motion is based on sovereign immunity, its denial is properly before us. *See Hawkins v. State of North Carolina,* 117 N.C.App. 615, 622, 453 S.E.2d 233, 237 (1995).

Defendants argue that because they owed no duty to plaintiffs, they cannot be held liable to them under the Tort Claims Act. The first reason they cite for lack of duty is the public duty doctrine. However, in an opinion filed contemporaneously herewith, *Hunt v. North Carolina Department of Labor,* 125 N.C.App. 293, 480 S.E.2d 413 (1997), we reject this argument and hold that the public duty doctrine does not apply in actions brought against State agencies under the Tort Claims Act. Accordingly, this argument has no merit.

Defendants next argue that no duty is imposed by Chapter 95 of the North Carolina General Statutes, entitled "Department of Labor and Labor Regulations." They argue that if Chapter 95 establishes a duty, it is a duty owed by the employer not the government. We disagree.

Plaintiffs allege that a duty is imposed by N.C. Gen. Stat. section 95-4. This statute states that the Commissioner of Labor is *"charged with the duty"*:

> (4) To secure the enforcement of all laws relating to the inspection of factories, mercantile establishments, mills, workshops, public eating places and commercial institutions in the State. . . .

> (5) To visit and inspect, personally or through his assistants and factory inspectors, at reasonable hours, as often as practicable, the factories, mercantile establishments, mills, workshops, public eating places, and commercial institutions in the State, where goods, wares, or merchandise are manufactured, purchased, or sold, at wholesale or retail.
>
> (6) To enforce the provisions of this section and to prosecute all violations of laws relating to the inspection of factories, mercantile establishments, mills, workshops, public eating houses, and commercial institutions in this State before any court of competent jurisdiction. . . .

N.C. Gen.Stat. § 95-4 (1993) (emphasis added).

This statute clearly imposes specific duties upon the Commissioner of Labor to enforce inspection laws, to inspect the workplaces of North Carolina and to prosecute violations. One obvious purpose of this statute is to provide for the safety of the people who work in commercial establishments and to protect them from injuries in the workplace arising from unsafe conditions. Therefore, we hold that a violation of these duties to inspect and enforce can give rise to an action for negligence. *See Hunt v. North Carolina Department of Labor*, 125 N.C.App. 293, 480 S.E.2d 413; *see also Coleman v. Cooper*, 89 N.C. App. 188, 195-97, 366 S.E.2d 2, 7-8 (1988).

In the present case, plaintiffs have alleged that defendants have never inspected the plant. They further allege that, as a result of this breach of defendants' duty to inspect, they suffered injury. We hold that these allegations are sufficient to enable plaintiffs' negligence claim to withstand a motion to dismiss. Accordingly, the Industrial Commission did not err in denying defendants' motions.

Affirmed.

WALKER and MARK D. MARTIN, JJ., concur.

IN THE SUPREME COURT
STATE OF NORTH CAROLINA

No. 81PA97

STONE

v.

N.C. DEPT. OF LABOR

PETITION TO REHEAR

Petition by plaintiffs to rehear pursuant to Rule 31 denied 2 April 1998.

NORTH CAROLINA INDUSTRIAL COMMISSION

I.C. No. TA-12795 Through TA-13076

and

I.C. No. TA-13507 Through TA-13509

and

I.C. No. TA-13521 & TA-13542

MULTIPLE CLAIMANTS,
Plaintiffs,

-v-

NORTH CAROLINA DEPARTMENT OF LABOR,
and NORTH CAROLINA DEPARTMENT OF LABOR,
DIVISION OF OCCUPATIONAL SAFETY AND HEALTH,
Defendants.

ORDER FOR THE FULL COMMISSION

BY THOMAS J. BOLCH
COMMISSIONER

FILED: Dec. 19, 1995

This matter was reviewed by Full Commission on 13 November 1995 upon the appeal of defendants from an Order by Deputy Commissioner Bernard D. Alston, filed 12 June 1995, in which defendants' Motions to Dismiss for lack of personal and subject matter jurisdiction and for failing to state a claim upon which relief can be granted were denied.

In the 12 June 1995 Order by Deputy Commissioner Alston, defendants' Motion to Stay Discovery was denied. Defendants renewed their Motion to Chairman J. Howard Bunn, Jr., who on 3 August 1995 filed an Order Allowing Defendants' Motion and Stayed Discovery pending appeal to the Full Commission. No appeal from Chairman Bunn's Order was filed and that issue is not at this time before the Full Commission, except for the fact that once this Order is filed, discovery is no longer stayed and may proceed.

The Full Commission has reviewed the prior order based upon the record of the proceedings before Deputy Commissioner Bernard D. Alston and the briefs and oral arguments before the Full Commission. Defendants' have not shown good ground to reverse the Order by Deputy Commissioner Bernard D. Alston.

The Full Commission finds that good cause has not been shown by defendants to support their motions. The claims filed by the plaintiffs in this matter do state recognized claims against defendants upon which relief can be granted. Therefore, the Full Commission AFFIRMS and ADOPTS the denial by Deputy Commissioner Alston of defendants' motions pursuant to Rule 12(b)(6).

Since plaintiffs have stated claims against defendants upon which relief can be granted, the Industrial Commission, pursuant to the North Carolina Tort Claims Act, has jurisdiction over the subject matter of these claims and personal jurisdiction over defendants. N.C. Gen. Stat. § 143-291 *et seq.* Therefore, the Full Commission AFFIRMS and ADOPTS the denial by Deputy Commissioner Alston of defendants' motions pursuant to Rule 12(b)(1) and Rule 12(b)(2).

On 29 December 1995 the Industrial Commission received a Notice of Appeal from the North Carolina Department of Labor in I.C. NO. TA-13542, *Jason Lamont Hunt, by and through his Guardian Ad Litem, David H. Hasty v. North Carolina Department of Labor.* Defendants in TA-13542 appeal from an Order by Deputy Commissioner John A. Hedrick, filed 22 November 1995, in which their Motion To Dismiss plaintiff's claim for lack of personal and subject matter jurisdiction and for failing to state a claim upon which relief can be granted was denied.

The issues, facts and relevant law controlling the case in TA-13542 are substantially similar if not identical to those in TA-12975 through TA-13076 and TA-13507 through TA-13509 and TA-13521. Further, the Full Commission has already heard oral arguments in the previously consolidated cases. Therefore, pursuant to Industrial Commission Rule 701(8), the Full Commission shall decide the appeal in TA-13542 based solely on the record.

Having reviewed the record, the Full Commission AFFIRMS and ADOPTS the ORDER denying defendants' Motion to Dismiss, filed by Deputy Commissioner Hedrick on 22 November 1995.

Additionally, the Full Commisssion ORDERS that I.C. NO. TA-13542 is hereby CONSOLIDATED with the previously joined cases in *Multiple Claimants v. North Carolina Department of Labor* (TA-12975 through TA-13076 and TA-13507 through TA-13509 and TA-13521) for future actions before the Industrial Commission.

Defendants shall pay the costs due this Commission.

/s/ Thomas J. Bolch
THOMAS J. BOLCH
Commissioner

CONCURRING:

/s/ Laura Kranifeld Mavretic
LAURA KRANIFELD MAVRETIC
Commissioner

/s/ Coy M. Vance
COY M. VANCE
Commissioner

NORTH CAROLINA INDUSTRIAL COMISSION

I.C. #TA-12975 through TA-13076

and

I.C. #TA-13507 through TA-13509

and

TA-13521

MULTIPLE CLAIMANTS,
Plaintiffs,

v.

NORTH CAROLINA DEPARTMENT OF LABOR,
and NORTH CAROLINA DEPARTMENT OF LABOR,
DIVISION OF OCCUPATIONAL SAFETY AND HEALTH,
Defendants.

ORDER

BY D. BERNARD ALSTON
DEPUTY COMISSIONER

FILED: June 12, 1995

This matter is presently before the undersigned upon defendants' Motions to Dismiss Claim and Motions to Stay Discovery, said motions being served upon plaintiffs on November 30, 1993 in TA-12975 through TA-13076, and identical motions were served upon plaintiffs on November 21, 1994 in TA-13507 through TA-13509 and

TA-13521. Defendants have submitted Memoranda of Law in support of each motion, and plaintiffs have responded by opposing each motion and submitting Memoranda of Law in support of their opposition. By agreement of counsel for all parties, these claims are consolidated for decision upon said motions.

A hearing was scheduled and conducted before the undersigned in Rockingham, North Carolina on April 27, 1995 at which time, counsel for parties presented oral argument in support of their respective positions. The motions are now ready for decision.

The undersigned, having reviewed the Memoranda of Law submitted by the parties, and having heard oral argument from each party, hereby finds that good cause has not been shown by the defendants in support of their motions. The claims filed by the plaintiffs in this matter do state recognized claims against the defendants upon which relief can be granted, and therefore, defendants' Rule 12 (b)(6) motions are DENIED.

Since plaintiffs have stated claims against defendants upon which relief can be granted, the Industrial Commission, pursuant to the North Carolina Tort Claims Act, has jurisdiction over the subject matter of these claims and personal jurisdiction over the defendants. N.C. Gen. Stat. § 143-291 *et seq.* Therefore, defendants' Rule 12(b)(1) and 12(b)(2) motions are DENIED.

In the discretion of the undersigned, defendants' Motions to Stay Discovery are also DENIED. Accordingly, the parties are ORDERED to present an agreed upon discovery schedule within twenty (20) days of the filing of this ORDER.

No costs are assessed at this time.

/s/ D. Bernard Alston
D. BERNARD ALSTON
Deputy Commissioner

Supreme Court, U.S.
FILED
OCT 16 1998
OFFICE OF THE CLERK

No. 98-378

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

JANET B. STONE, *et al.*,
Petitioners,

v.

NORTH CAROLINA DEPARTMENT OF LABOR and
NORTH CAROLINA DEPARTMENT OF LABOR,
OCCUPATIONAL SAFETY AND HEALTH DIVISION,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-378

JANET B. STONE, *et al.*,
Petitioners,

v.

NORTH CAROLINA DEPARTMENT OF LABOR and
NORTH CAROLINA DEPARTMENT OF LABOR,
OCCUPATIONAL SAFETY AND HEALTH DIVISION,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

---

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Janet B. Stone, and each of the other plaintiffs named in the caption of the Petition for Writ of Certiorari ("Petition") filed in this matter, respectfully submit this Supplemental Brief in Support of Petition for Writ of Certiorari ("Supplemental Brief") under Rule 15.8 of the Rules of the Supreme Court of the United States. Plaintiffs submit this Supplemental Brief for purposes of inviting to the Court's attention new cases and intervening matter not available at the time of their last filing. Specifically, plaintiffs hereby inform the Court that the decision of the United States Court of Appeals for the First Circuit in *Irving v. United States*, No. 96-2368, 1998 WL 152941 (1st Cir. (N.H.), April 8, 1998),

cited and discussed at length in the Petition, has been withdrawn pursuant to the Order of the First Circuit Court of Appeals, sitting *en banc*. *Irving v. United States*, 146 F.3d 12 (1st Cir. 1998).[1]

In their Petition, plaintiffs analyzed how the decision below by the Supreme Court of North Carolina in *Stone* conflicted with the most recent decision of the First Circuit in *Irving*. The *Stone* decision improperly held, at the Rule 12(b)(6) stage, that negligent inspection activities conducted pursuant to the Occupational Safety & Health Act of 1970 ("the Federal OSHA Act") could not give rise to a duty of care being owed to the affected workers.[2] By contrast, *Irving* had allowed an employee injured as a proximate result of negligent OSHA inspections to recover for her injuries. The conflict between the decision below and the decision in *Irving* was among the grounds plaintiffs identified for review under Rule 10(b) of the Rules of the Supreme Court of the United States. Particularly, a state court of last resort in *Stone* had decided an important Federal question in a way that conflicted with the decision of a United States Court of Appeals in *Irving*.

---

[1] The order withdrawing the most recent opinion in *Irving* had been entered, but not yet reported, when plaintiffs initially filed their Petition. The order was reported between the time of submision of plaintiffs' initial petition and the time that it was resubmitted in proper format pursuant to the 8 July 1998 Order of the Honorable William K. Suter, Clerk of the Supreme Court of the United States. Before re-submission, counsel for plaintiffs inquired of the Office of the Clerk whether the subsequent history in *Irving* and its effects should be discused in the re-submitted Petition, or whether they should be made known to the Court by supplemental brief pursuant to Rule 15.8. Based upon the direction of the Office of the Clerk, plaintiffs preserved the substance of their initial filing and now submit this Supplemental Brief to address the case history in *Irving*.

[2] Rule 12(b)(6) of the North Carolina Rules of Civil Procedure is identical to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

The *en banc* order of the First Circuit withdrawing the panel's 8 April 1998 *Irving* opinion doubtless affects the specific comparison between the language of that decision and the language of *Stone*. Nonetheless, a direct conflict remains between the jurisprudence of the First Circuit and of the Supreme Court of North Carolina. To demonstrate the continuing conflict, plaintiffs outline briefly the history of the *Irving* matter. Then, they demonstrate that the conflict still exists. Finally, because the importance of the Question Presented in plaintiffs' Petition has now been heightened due to *en banc* reconsideration of *Irving*, plaintiffs show the Court that this case merits review on Writ of Certiorari even more strongly now than before.

I. THE IRVING CASES PROPERLY DECLARE THE LAW.

The *Irving* suit arose after Federal OSHA compliance officers had inspected the plaintiff's place of employment in a Somerset, New Hampshire shoe factory on more than one occasion during the late 1970's. They negligently inspected the premises, failing to disclose that the plaintiff was working in close proximity to a hazardous machine that violated OSHA standards. On 10 October 1979, the plaintiff's hair came in contact with equipment and scalped her, resulting in gruesome and permanent injuries.

The United States District Court for the District of New Hampshire initially held that the plaintiff had stated a claim upon which relief could be granted. *Irving v. United States*, 532 F. Supp. 840 (D.N.H. 1982). The court then tried the suit and, after trial, dismissed it without reaching the merits. Apparently, it reasoned that this Court's decision in *Berkovitz v. United States*, 489 U.S. 531, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988), interpreting the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C.S. § 2680(a), had so expanded that legislation as to prevent any governmental liability for negligent OSHA inspections. *Irving v. United*

States, 909 F.2d 598, 599 (1st Cir. 1990). However, on appeal, the First Circuit corrected the District Court's mistaken notion, vacated its decision in an unpublished opinion, and remanded it for further consideration. *Irving v. United States*, 867 F.2d 606 (1st Cir. 1988) (table of opinions) (hereafter, "*Irving I*").

On remand, the District Court failed to follow the mandate of the Court of Appeals directing that it make certain findings, and again dismissed the case without an analysis of the evidence. The plaintiff appealed. The First Circuit then issued a published opinion, *Irving v. United States*, 909 F.2d 598 (1st Cir. 1990) (hereafter, "*Irving II*"), in which it rejected the proposition that all negligent OSHA inspections are immune from suit under the discretionary function exception to the Federal Tort Claims Act ("FTCA"). In pertinent part, *Irving II* states as follows:

> The Supreme Court [of the United States] has emphatically rejected the assertion that "the [discretionary function] exception precludes liability for any and all acts arising out of regulatory programs of federal agencies." *Berkovitz* [*v. United States*, 489 U.S. 531, 538, 108 S.Ct. 1954, 1960, 100 L.Ed.2d 531 (1988)]. Instead, the inquiry focuses on the permissible range of action available to the government employees allegedly at fault.

Irving II, 909 F.2d at 600. Moreover, *Irving II* cites a fair number of cases allowing suits to proceed for negligent inspection by governmental employees, *id.* at 601, and does not even suggest that a uniquely governmental purpose in undertaking inspection or enforcement activities somehow entitles the government to a blanket immunity.

Even after the First Circuit remanded for specific findings, the trial court again failed to make them and again ruled against the plaintiff. *Irving v. United States*, 1994 WL 287750 (D.N.H. 1994), *reh'g denied*, 1994 WL

392614 (D.N.H. 1994). The plaintiff again appealed, and the First Circuit Court of Appeals again vacated and remanded. This decision, reported as *Irving v. United States*, 49 F.3d 830 (1st Cir. 1995) and referred to herein as "*Irving III*," reaffirmed that negligent governmental inspections are not *per se* immune from suit. Rather, if the evidence shows actionable negligence by a governmental employee, the claim can survive. *Id.* at 833.

The case was tried to a new judge, who rendered a decision finding the government negligent and awarding the plaintiff compensatory damages under the FTCA. *Irving v. U.S.*, 942 F. Supp. 1483, 1504, n.26 (D.N.H. 1996). The District Court rejected the government's argument that there is immunity from liability for a "uniquely governmental function," such as regulatory enforcement activities. *Id.* at 1504, n.26. It held that the government's theory was groundless, as it directly conflicted with the decisions of this Court in *Indian Towing Co. v. United States*, 350 U.S. 61, 67, 76 S.Ct. 122, 125-26, 100 L.Ed. 48 (1954) and *Berkovitz, supra*, 486 U.S. at 538-39, 108 S.Ct. at 1959-60.

The First Circuit affirmed the award in *Irving v. United States*, No. 96-2368, 1998 WL 152941 (1st Cir. (N.H.), April 8, 1998) (hereafter, "*Irving IV*"). Plaintiffs discussed *Irving IV* extensively in their Petition. Their reason for doing so without devoting similar attention to previous opinions in the case was that *Irving IV* had completed the fact-finding process and constituted the last word of a fully-litigated dispute. While the First Circuit Court of Appeals withdrew the *Irving IV* opinion *en banc*, 146 F.3d 12 (1st Cir. 1998) (hereafter, "*Irving V*"), that order did not purport to change or overrule the rationale underlying the earlier *Irving* decisions.

Because *Irving V* has changed nothing substantive, the law of the First Circuit still holds that claims based on negligent OSHA inspections are not *per se* subject to dismissal under the FTCA. As discussed in plaintiffs' Peti-

tion, that standard is based upon and consistent with the decisions of this Court. Because *Stone* does create such a *per se* rule of immunity in direct conflict with the FTCA and the Federal OSHA Act, the decision below must be reviewed and reversed.

II. THE CONFLICT REMAINS BETWEEN STONE AND IRVING.

None of the *Irving* opinions suggest that federal regulatory inspections are subject to *per se* immunity from suit under the Federal Tort Claims Act. Nor is this situation surprising, since the court in *Irving III* reiterated that the prior decisions were binding unless and until the Supreme Court of the United States, Congress or the First Circuit itself sitting *en banc* changed the law. *Irving III*, 49 F.3d at 835. Thus, the mere fact that a governmental entity is engaged in regulatory inspection and enforcement activities does not provide it with per se immunity from negligence liability.

The Supreme Court of North Carolina's decision in *Stone* is in direct conflict with that standard. As discussed in the Petition, *Stone* immunized completely from tort liability the defendants' enforcement activities solely because they were governmental in nature. Petition at 10; 6a; 10a-11a. The mere fact that the First Circuit *en banc* has vacated *Irving IV* does not vitiate the earlier *Irving* decisions. More importantly, it has no effect on the decisions of this Court holding that a tortfeasor's conduct resulting in injury is subject to suit regardless of whether it had a "uniquely governmental" function or purpose when undertaking the conduct. *See, e.g., Indian Towing Co., supra*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (governmental function of operating a Coast Guard not immune); *Rayonier Incorporated v. United States*, 352 U.S. 315, 77 S.Ct. 374 (1957) (governmental function of managing and fighting forest fires on government land not immune).

The result of the First Circuit withdrawing the opinion in *Irving IV*, but leaving undisturbed earlier decisions declaring that the law allows recovery for negligent OSHA inspection activities in at least some circumstances, is that a conflict still exists between the First Circuit and the Supreme Court of North Carolina. State OSHA programs must be at least as effective as the Federal program "in providing safe and healthful employment and places of employment." 29 U.S.C.S. § 667 (1990). The Supreme Court of North Carolina in *Stone* failed to enforce this part of the Federal OSHA Act by permitting less protection for workers under the North Carolina OSHA program than what would have been provided to them under the Federal OSHA Act and the FTCA if the Federal Government had been carrying out occupational safety and health duties in North Carolina.

III. THE QUESTION PRESENTED IN PLAINTIFFS' PETITION IS EVEN MORE COMPELLING IN LIGHT OF THE FACT THAT A FIRST CIRCUIT EN BANC DECISION MUST BE RENDERED.

Regardless of what the First Circuit's ultimate decision may be in *Irving*, the case at bar should be reviewed. If the First Circuit, sitting *en banc*, determines that the *Irving* plaintiff is entitled to recover, the conflict between the First Circuit and the Supreme Court of North Carolina would continue to exist and the issue would still need a resolution by this Court to bring harmony to the law. However, if the First Circuit decides to ignore the decisions of this Court in *Indian Towing* and *Rayonier* and concludes that so-called uniquely governmental functions, such as OSHA inspections, are entitled to per se immunity from suit, then all the greater reason exists to allow not only plaintiffs' Petition here, but also the *Irving* plaintiff's likely petition for a writ of certiorari so that this Court can resolve the law at one time and without the rights of the injured plaintiffs in both suits being impaired. The timing of the *Irving* decisions and the im-

portant questions of federalism that arise where a State assumes a duty to meet federal standards, fails to do so, and then hides behind state law doctrines to avoid liability, call strongly for this Court to allow the Petition for a Writ of Certiorari and to permit plaintiffs to proceed with their case.

CONCLUSION

The Petition for a Writ of Certiorari should be granted, the decision of the Supreme Court of North Carolina reversed, and the case remanded for further proceedings not inconsistent therewith.

Respectfully submitted,

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No. 98-378

In the

Supreme Court of the United States

October Term, 1998

JANET B. STONE, *et al.*,

Petitioners,

v.

NORTH CAROLINA DEPARTMENT OF LABOR AND
NORTH CAROLINA DEPARTMENT OF LABOR,
OCCUPATIONAL SAFETY AND HEALTH DIVISION,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

BRIEF IN OPPOSITION

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No. 98-378

In the

Supreme Court of the United States

October Term, 1998

JANET B. STONE, *et al.*,

Petitioners,

v.

NORTH CAROLINA DEPARTMENT OF LABOR AND NORTH CAROLINA DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH DIVISION,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

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BRIEF IN OPPOSITION

QUESTION PRESENTED

Petitioners' statement of the Question Presented satisfies Respondents.

LISTING OF PARTIES

Petitioners' listing of the parties satisfies the Respondents.

OPINIONS BELOW

Petitioners accurately cite the Court to the opinions below.

JURISDICTION

Petitioners' citation of jurisdiction satisfies the Respondents, although Respondents contend that Petitioners fail to establish jurisdiction.

STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions cited by Petitioners, the Respondents contend the issue presented involves the following statutory provisions:

29 U.S.C. § 653(b)(4) of the Occupational Safety and Health Act provides that "[n]othing in this Act shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment."

N.C. GEN. STAT. § 143-291(a) governing tort claims against state departments and agencies, provides, in relevant part, that "[t]he Industrial Commission shall determine whether

or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina."

STATEMENT OF THE CASE

A. THE PROCEEDINGS BELOW

Each of the one hundred eight (108) petitioners timely filed a verified affidavit of claim with the North Carolina Industrial Commission pursuant to the North Carolina Tort Claims Act, N.C. GEN. STAT. § 143-291 *et seq.* The Respondents timely moved to dismiss for lack of jurisdiction over the subject and person as well as for failure to state a claim upon which relief may be granted pursuant to N.C. GEN. STAT. § 1A-1, Rule 12(b)(1), (2) and (6). (App. at 67a) The Deputy Commissioner, on 12 June 1995, denied the motion, and the Respondents appealed to the Full North Carolina Industrial Commission. On 19 December 1995, the Commission affirmed the decision of the Deputy Commissioner.

Respondents timely appealed to the North Carolina Court of Appeals. On 4 February 1997, that court affirmed the North Carolina Industrial Commission. Respondents then filed a Petition for Discretionary Review with the Supreme Court of

North Carolina. The Supreme Court of North Carolina granted the petition on 5 June 1997 and, following briefing and argument, filed its opinion on 6 February 1998. Petitioners timely petitioned for rehearing on 13 March 1998. The Supreme Court of North Carolina denied rehearing on 2 April 1998.

B. THE FACTS

The Supreme Court of North Carolina noted that the case appeared before it upon a motion to dismiss. That court examined the verified claims and found the following facts:

> Because these claims arise upon defendants' motions to dismiss, we treat plaintiffs' factual allegations, which follow, as true. *See Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 332 N.C. 645, 646, 423 S.E.2d 72, 72 (1992). On 3 September 1991 a fire started in a hydraulic line near a deep fat fryer in the Imperial Foods Products chicken plant (the plant) in Hamlet, North Carolina. The fire grew in intensity and spread rapidly through the interior of the plant. Plaintiffs are either former employees of Imperial Foods who suffered injury in the fire or personal representatives of the estates of employees who died in the fire. They or their decedents (plaintiffs) were lawfully inside the plant at the

> time of the fire. Plaintiffs could not easily escape the plant or the fire because the exits in the plant were unmarked, blocked, and inaccessible. After the fire the North Carolina Department of Labor and its Occupational Safety and Health Division (defendants) conducted their first and only inspection in the plant's eleven-year history of operation. As a result of this inspection, defendants discovered numerous violations of the Occupational Safety and Health Act of North Carolina (OSHANC), including the plant's inadequate and blocked exits and inadequate fire suppression system. Defendants issued eighty-three citations against Imperial Foods Products for violations of OSHANC standards. Plaintiffs alleged, *inter alia*, that defendants had a duty under OSHANC to inspect the plant, defendants breached that duty by failing to inspect until after the fire, defendants' breach caused plaintiffs' injuries or deaths, and plaintiffs' injuries or deaths entitle them to damages in tort.

Stone v. North Carolina Dep't of Labor, 347 N.C. 473, 477, 495 S.E.2d 711, 713 (1998). Each of the one hundred eight (108) verified claims alleged essentially the same facts. A representative claim alleging a wrongful death appears in the

Appendix to this brief at pages 1a-34a. A representative claim alleging personal injury appears at pages 35a-65a.

REASONS THE WRIT OUGHT NOT ISSUE

I. PETITIONERS FAILED TO PROPERLY RAISE, BEFORE THE SUPREME COURT OF NORTH CAROLINA, THE ISSUE THEY PRESENT TO THIS COURT.

Petitioners ask this Court to decide:

> Did the Supreme Court of North Carolina violate the Federal OSHA Act when it concluded that the State of North Carolina could not be held liable for negligently enforcing its OSHA program on the ground that its OSHA enforcement authorities owed no duties to individual workers injured by their negligence?

(Petition at i.) Petitioners assert that, in conjunction with the Federal Tort Claims Act (United States Code Title 28, Chapter 171) and specifically 28 U.S.C. § 2674:

> The key to this case is the proposition that defendants can have no lesser duties than the federal government would have if it were operating the occupational safety and health

> program in North Carolina. 29 U.S.C.S. § 667 (1990).

(Petition at 21.) The Supreme Court of North Carolina never addressed this issue, and Petitioners failed to present this issue to that Court. Petitioners establish no jurisdictional federal question required by 28 U.S.C. § 1257.

This Court reviews state court judgments pursuant to 28 U.S.C. § 1257 only when the case presents a clear federal question. As this Court noted:

> With 'very rare exceptions,' *Yee v. Escondido*, 503 U.S. 519, 533, 112 S.Ct. 1522, 1531, 118 L.Ed.2d 153 (1992), we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.

Adams v. Robertson, 117 S. Ct. 1028, 1029 (1997). This Court assumes that Petitioners failed to raise the federal question when the state court record stands silent on the issue. To defeat this assumption, Petitioners must demonstrate that the state court possessed a fair opportunity to address the federal question presented in the Petition by showing that they presented the federal claim with fair precision and in due time.

Id. at 1030. The Petitioners clearly fail to do so. The record in the Supreme Court of North Carolina reveals no presentation of this federal issue.

The Supreme Court of North Carolina never addressed any federal question in this matter. That court considered this case as a state tort claim sounding in negligence filed against an agency of the State of North Carolina pursuant to N.C. GEN. STAT. §143-291 *et seq*. This negligence action rested upon the breach of an alleged duty imposed by N.C. GEN. STAT. § 95-4 (setting forth the authority, powers and duties of the North Carolina Commissioner of Labor). The Supreme Court of North Carolina noted that "[p]laintiffs assert that the defendants owed each claimant a duty under N.C.G.S. § 95-4 to inspect the Imperial Foods Products plant." (Petition App. at 11a) In its opinion, the court below never discussed the applicability to these claims of any federal statute, and Petitioners point this Court to nothing before the Supreme Court of North Carolina which asserted, as they argue here for the first time, that 29 U.S.C. § 667 through the Federal Tort Claims Act requires North Carolina to recognize a tort claim in favor of individual workers against the North Carolina Department of Labor for the failure to prevent job site injuries.

Petitioners assert that the necessary effect of the North Carolina court's judgment was to deny the federal claim. Thus, pursuant to *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928), Petitioners contend they asserted a federal question now ripe for review by this Court. *New York ex rel.*

Bryant v. Zimmerman involved a constitutional challenge to a state statute in a habeas proceeding in which the Petitioner unequivocally asserted a Fourteenth Amendment challenge to a state statute. The lower of the two state appellate courts practically rested its decision upon a prior federal case in which this Court had sustained an equal protection clause challenge to a New York statute. *Id. at* 68-69. While New York's highest appellate court never mentioned the Fourteenth Amendment in its opinion, it discussed the case "as if it were considering the identical claim of invalidity" raised by the petitioner in the lower state appellate court. *Id. at* 69. Thus, this Court concluded that Zimmerman properly raised the federal claim.

Here, the record is very different. The Supreme Court of North Carolina discussed this case only in terms of N.C. GEN. STAT. § 143-291 *et seq.* and N.C. GEN. STAT. § 95-4. This discussion is consistent with the North Carolina Court of Appeals' treatment of the matter. Furthermore, Petitioners never argued before the Supreme Court of North Carolina that because, under the Federal Tort Claims Act, workers could bring a claim for negligent inspection against federal OSHA, 29 U.S.C. § 667 mandated that workers must possess the right to bring a similar claim pursuant to N.C. GEN. STAT. § 143-291 *et seq.* against the North Carolina Department of Labor, Division of Occupational Safety and Health. Thus, the presumption remains that Petitioners failed to properly present the federal issue in the court below.

Petitioners also assert, citing *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942) that the North Carolina Supreme Court failed to base its decision upon an adequate and independent state ground. In *Standard Oil*, the Supreme Court of the State of California construed an exemption to a statute imposing a state motor vehicle fuel license tax. The California statute imposed the license tax, measured by gallonage, on the privilege of distributing any motor vehicle fuel. The statute exempted from taxation any fuel sold "to the government of the United States or any department thereof for official use of said government." Standard Oil sold fuel to army post exchanges, and filed suit challenging the constitutionality of the statute if construed as imposing a tax upon sales to army post exchanges. *Id.* at 482.

The Supreme Court of California interpreted the California statute and determined that army post exchanges did not constitute the government of the United States or any department thereof. Thus, Standard Oil was not exempt from paying the tax upon motor vehicle fuel sold to army post exchanges.

This Court found a federal question determined by a state court and subject to review. The California Court, in deciding the case, determined the relationship between the government of the United States and post exchanges. Thus, the decision involved a federal question, not a state law determination. *Id.* at 483

Here, the Supreme Court of North Carolina decided this matter solely upon the North Carolina Tort Claims Act, N.C. GEN. STAT. § 143-291 *et seq.*, as well as N.C. GEN. STAT. § 95-4 and North Carolina substantive tort law. Nothing in that determination of necessity involved a consideration of 29 U.S.C. § 667 or the Federal Tort Claims Act. Thus, *Standard Oil* stands inapplicable to a determination of jurisdiction in this matter.

Petitioners clearly failed to raise in the North Carolina Supreme Court the purported federal question upon which they now seek review. This Court should deny the writ.

II. PETITIONERS DEMONSTRATE NO CONFLICT BETWEEN THE DECISION BELOW, THIS COURT'S DECISIONS, AND THE DECISION IN *IRVING V. UNITED STATES.*

Petitioners assert that the Supreme Court of North Carolina's decision here conflicts with the decision of the United States Court of Appeals for the First Circuit in *Irving v. United States*, Nos. 96-2368 and 96-2369, 1998 WL 152941 (1st Cir. Apr. 8, 1998), *opin. withdrawn*, 146 F.3d 12 (1st Cir. June 8, 1998). Pursuant to the Federal Tort Claims Act, Irving asserted injury based upon a negligent inspection conducted by federal Occupational Safety and Health inspectors at a New Hampshire work site. Applying substantive New Hampshire tort law, the circuit court allowed recovery. Relying upon *Irving*, Petitioners contend that, because 29 U.S.C. § 667 requires a state occupational safety and health program to be as

effective as the federal program, the Supreme Court of North Carolina violated 29 U.S.C. § 667 by disallowing claims for negligent inspection by state inspectors under the North Carolina Tort Claims Act (N.C. GEN. STAT. § 143-291 *et seq.*). In their Supplemental Brief, Petitioners inform the Court that the First Circuit, sitting *en banc,* ordered the 8 April 1998 *Irving* opinion withdrawn. *See* 146 F.3d 12. Petitioners argue, however, that the Supreme Court of North Carolina's opinion still conflicts with the law as set forth in earlier *Irving* opinions and as established by other authorities. (Supp. Petition at 6.) A review of the *Irving* opinions and other authorities reveals no conflict. This Court should deny the writ.

As the lynchpin of their argument, Petitioners assert that 29 U.S.C. § 667 imposes upon the Respondents a duty to the Petitioners, enforceable in tort, to provide an OSHA program at least as effective as the federal program. 29 U.S.C. § 667 merely sets forth the conditions upon which the Secretary of Labor shall approve a state plan for OSHA enforcement. *See* 29 U.S.C. § 667(c)(1990). Any duties a state OSHA program might owe under that statute clearly stand owed only to the Secretary of Labor, not to individual workers in North Carolina. In fact, a review of the entire Occupational Safety and Health Act reveals no language to suggest that Congress, by that enactment, intended to affect state tort law and provide workers a right to sue state agencies in tort for asserted inadequacies of a state occupational safety and health program. Indeed, 29 U.S.C. § 653(b)(4) strongly suggests that Congress never intended the Occupational Safety and Health Act to

affect state tort law in any manner. Petitioners cite this Court no authority suggesting otherwise. Thus, Petitioners' argument fails.

No law in the prior *Irving* opinions conflicts with the law enunciated here by the Supreme Court of North Carolina. Irving's federal tort claim rested upon an allegedly negligent inspection by federal OSHA inspectors of a New Hampshire work site. 28 U.S.C. § 2674 provides that the United States shall be liable "in the same manner and to the same extent as a private individual under like circumstances" In short, the substantive law of the state which is the site of the alleged wrongful conduct governs claims under the Federal Tort Claims Act. *See United States v. Muniz*, 374 U.S. 150 (1963). A federal court deciding a federal tort claim arising in North Carolina would apply North Carolina substantive tort law, while a federal court deciding a tort claim arising in New Hampshire would apply New Hampshire substantive tort law.

Significantly, in the now withdrawn opinion, the *Irving* court applied substantive New Hampshire tort law and found liability for the negligent inspection based upon New Hampshire's Good Samaritan doctrine. In its 8 June 1998 Order withdrawing the April Opinion, the First Circuit ordered:

> The issues for *en banc* review include both the applicability of the Federal Tort Claims Act and its discretionary function exception, and the question of whether New Hampshire law

> (particularly that state's Good Samaritan doctrine) would hold a private actor liable under the circumstances of this case.

Thus, recovery for the plaintiff in *Irving* rests upon New Hampshire substantive tort law as well as the effect of the discretionary function exception found in the federal tort claims statutes. Nothing in the withdrawn *Irving* opinion, nor in the earlier opinions, suggests that the federal Occupational Safety and Health Act itself creates any duty owed to individual workers enforceable in tort.

In *Stone*, the Supreme Court of North Carolina applied North Carolina tort law to a state tort claim, just as a United States District Court would apply North Carolina tort law to a claim under the Federal Tort Claims Act where the allegedly wrongful act occurred in North Carolina. Such law includes the common law public duty doctrine. Petitioners fail to demonstrate how the result in this matter would have been different had the Federal Occupational Safety and Health Administration failed to inspect the Imperial Food Products North Carolina facility and had the Petitioners sued under the Federal Tort Claims Act. The difference between the *Irving* result with the result here reflects the nature of our federal system, not a violation of federal law. Nothing in the decision here appears inconsistent with the now withdrawn decision in *Irving*.

CONCLUSION

Petitioners establish no federal question reviewable by this Court. The Supreme Court of North Carolina properly applied North Carolina law. Petitioners demonstrate no conflict with any federal statute. This Court should deny the writ.

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October 30, 1998

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VERIFIED CLAIM OF WILLIAM KELLY, JR. AS FILED AUGUST 24, 1993

NORTH CAROLINA INDUSTRIAL COMMISSION
I.C. NO. TA-13053

WILLIAM KELLY, JR., Administrator of the Estate of BRENDA GAIL KELLY, Deceased,	)	
Claimant,	)	VERIFIED CLAIM
v.	)	
NORTH CAROLINA DEPARTMENT OF LABOR, and NORTH CAROLINA DEPARTMENT OF LABOR, DIVISION OF OCCUPATIONAL SAFETY AND HEALTH,	)	
Defendants.	)	

Claimant, William Kelly, Jr., by and through his undersigned counsel, alleges and says as follows:

THE PARTIES AND DEFENDANTS' OFFICERS, EMPLOYEES AND AGENTS

1. Claimant, William Kelly, Jr., is the duly authorized administrator of the estate of Brenda Gail Kelly, deceased, and is a resident of Richmond County, North

KELLY VERIFIED CLAIM, CONTINUED . . .

Carolina. A copy of the Letters of Administration certifying William Kelly, Jr., as the administrator of the estate of Brenda Gail Kelly is attached as Exhibit A, Letters of Administration, Richmond County, 91-E-219.

2. Defendant the North Carolina Department of Labor (sometimes "D.O.L.") is a political subdivision of the State of North Carolina.

3. Defendant the Division of Occupational Safety and Health, also known as the Office of Occupational Safety and Health (sometimes "North Carolina OSHA") is a political subdivision of the State of North Carolina and is an office within the North Carolina Department of Labor responsible for promulgation and enforcement of workplace safety standards, and for the performance of duties under the occupational Safety and Health Act of North Carolina (sometimes "OSHANC") and other applicable laws.

4. Consistent with the mandate of N.C.G.S. 143-297 and other applicable law, claimant identifies by name in the following paragraphs the State employees upon whose negligence the claims stated herein are based. Claimant identifies these persons without prejudice to his right to name other individuals whose negligence may be revealed through discovery as supporting claims under the Tort Claims Act.

KELLY VERIFIED CLAIM, CONTINUED . . .

5. At times relevant to this action, John C. Brooks was the Commissioner of the North Carolina Department of Labor acting as an officer, employee and agent for defendants D.O.L. and North Carolina OSHA (sometimes jointly "defendants") acting in the scope of his office, employment, service, agency and authority and having responsibilities for the enforcement of OSHANC, including at the Imperial Food Products, Inc. plant at 40 Bridges Street, Hamlet, Richmond County, North Carolina (sometimes "Hamlet plant').

6. Upon information and belief, at times relevant to this action, Michael D. Ragland was Deputy Commissioner of Health and Safety of D.O.L. and was an officer, employee and agent of defendants acting in the scope of his office, employment, service, agency and authority and having responsibilities for the enforcement of OSHANC, including at the Hamlet plant.

7. Upon information and belief, at times relevant to this action, James A. Oppold was the Director of North Carolina OSHA and an officer, employee and agent of defendants acting in the scope of his office, employment, service, agency and authority and having responsibilities for the enforcement of OSHANC including at the Hamlet plant.

8. Upon information and belief, at times relevant to this action, Richard Amos was a Bureau Chief with North Carolina OSHA and was an officer, employee and agent of

KELLY VERIFIED CLAIM, CONTINUED . . .

defendants acting in the scope of his office, employment, service, agency and authority, and having responsibilities for enforcement of OSHANC, including at the Hamlet plant.

9. Upon information and belief, at times relevant to this action, Frank Trogdon was District Safety Supervisor with North Carolina OSHA and was an officer, employee and agent of defendants acting within the scope of his office, employment, service, agency and authority and having responsibilities for enforcement of OSHANC, including at the Hamlet plant.

10. Upon information and belief, at times relevant to this action, David Poole, Charles W. Johnson, J. A. Bolton, and Douglas Jones were Compliance Safety and Health Officers with North Carolina OSHA and were officers, employees and agents of defendants acting within the scope of their offices, employments, services, agencies and authorities and having responsibilities for enforcement of OSHANC, including at the Hamlet plant.

11. Upon information and belief, at times relevant to this action Roseanne Morgan was a Health Supervisor and was an officer, employee and agent of defendants acting within the scope of her office, employment, service, agency and authority, and having responsibilities for enforcement of OSHANC, including at the Hamlet plant.

KELLY VERIFIED CLAIM, CONTINUED . . .

12. Upon information and belief, at times relevant to this action Tom Hayes and Rodger Griffin were officers, employees and agents of defendants acting in the scope of their offices, employments, services, agencies and authorities, and having responsibilities for enforcement of OSHANC, including at the Hamlet plant.

JURISDICTION

13. Pursuant to N.C.G.S. §143-291, the North Carolina Industrial Commission is constituted a court for the purpose of hearing and passing upon tort claims against all departments, institutions and agencies of the State, including the defendants.

THE IMPERIAL FOOD PRODUCTS FIRE

14. This action arises out of the negligent failure of the defendants to discharge duties of safety owed to the decedent, Brenda Gail Kelly, said negligence also amounting to an unreasonable, oppressive and manifest abuse of discretion and being a direct and proximate cause of the September 3, 1991 fire at the Hamlet, North Carolina, plant of Imperial Food Products Inc., which killed at least twenty-five (25) people, including Brenda Gail Kelly and injured at least fifty-six (56) others.

KELLY VERIFIED CLAIM, CONTINUED . . .

15. On September 3, 1991, the decedent Brenda Gail Kelly was an employee of Imperial Food Products, Inc., working at a chicken processing plant located in Hamlet, Richmond County, North Carolina. She worked in the packaging department.

16. On that date a fire developed in the processing area at the Imperial Foods plant in Hamlet.

17. Upon information and belief, a hydraulic line near a deep fat fryer in the processing section of the plant ruptured, igniting hydraulic fluid just a few feet away from a natural gas fume cooker used in chicken preparation and spraying the flammable hydraulic fluid at high pressure against the floor and the nearby cooker.

18. Upon information and belief, the fire, which grew in intensity and spread rapidly through the interior and various work areas of the plant, caused a spread of toxic gases and black smoke throughout the building.

19. The decedent Brenda Gail Kelly was killed by this fire. Between the time of the fire and the time of her death due to smoke inhalation and flames, the decedent Brenda Gail Kelly incurred extreme pain and suffering from the flames and smoke inhalation and underwent horrific terror and mental anguish in an effort to escape from the building.

KELLY VERIFIED CLAIM, CONTINUED . . .

20. This fire was one of the worst industrial disasters in American history, and could and should have been prevented by defendants adequately enforcing workplace safety laws enacted for the protection of the decedent Brenda Gail Kelly.

21. Defendants negligently failed to fulfill their duties and unreasonably, oppressively and manifestly abused their discretion by not taking steps which they were legally required to take to protect the decedent Brenda Gail Kelly.

22. Upon information and belief, the defendants for the first time inspected the Hamlet plant after the September 3, 1991 fire, and from the ruins of the plant and charred remains of the fire victims determined that Imperial Food Products, Inc'. had conditions in violation of OSHANC leading to the issuance of fifty-four (54) citations for willful violations of OSHANC standards, twenty-three (23) citations for serious violations of OSHANC standards, and six (6) citations for other than serious violations of OSHANC standards, resulting in penalties being assessed against Imperial Foods totalling $808,150.

23. The death of Brenda Gail Kelly was a direct and proximate result of the negligent breach by the defendants of statutory, regulatory, and common law duties described herein, and amounted to an unreasonable, oppressive and manifest abuse of discretion.

KELLY VERIFIED CLAIM, CONTINUED . . .

THE DUTIES AND THE NEGLIGENT ACTS AND OMISSIONS OF THE DEFENDANTS

24. Defendants owed duties to the decedent Brenda Gail Kelly and to William Kelly, Jr., administrator of her estate, which were imposed by federal and state statutes and regulations and by the common law, and which defendants negligently breached proximately and directly causing the death of Brenda Gail Kelly and causing the claimant to suffer damages, amounting to an unreasonable, oppressive and manifest abuse of defendants' discretion. The claimant incorporates the allegations contained in paragraphs 1 through 23 of this Verified Claim herein, and makes additional allegations below.

Duties of Defendants

25. In 1970, the Congress of the United States enacted and the President of the United States signed into law the Occupational Safety and Health Act of 1970, codified at 29 U.S.C. §651 *et seq.* (sometimes "Federal OSHA Act").

26. Under 29 U.S.C. §667, a section of the Federal OSHA Act, a state may assume responsibility for development and enforcement of occupational safety and health standards on certain terms and conditions, provided that the state's program (sometimes "State OSHA Program") is or will be at least as effective in providing safe and healthful employment and

KELLY VERIFIED CLAIM, CONTINUED . . .

places of employment as the standards promulgated by Congress and the United States Department of Labor under the Federal OSHA Act.

27. Under 28 U.S.C. §667, a State OSHA Program must provide sufficient legal authority and qualified personnel necessary for enforcement of such standards.

28. Under 28 U.S.C. §667, a State OSHA Program must have adequate funds devoted to the administration and enforcement of such standards.

29. Under the Federal OSHA Act and relevant federal regulations, including 29 C.F.R. §1901.1 *et seq*, it is the continuing duty of those states with a State OSHA Program to provide safety standards, funding, and enforcement at least as effective as the standards, funding and enforcement provided by the Federal OSHA Act and the regulations promulgated thereunder.

30. Pursuant to federal regulations located at 29 CFR §1901.1 *et seq*, a state which has adopted a State OSHA Program must maintain adequate funding and may not diminish its level of enforcement activity below that existing at the time of the agreement with the federal government leading to adoption of a State OSHA Program.

KELLY VERIFIED CLAIM, CONTINUED . . .

31. Under 29 U.S.C. §667 and 29 C.F.R. §1901.1 state with a State OSHA Program must provide for the development and enforcement of such standards as will be at least -as effective in providing safe and healthful employment and places of employment as the standards promulgated by Congress and the United States Department of Labor, and state agents responsible for execution of such programs must have sufficient legal authority to enforce these standards.

32. Under 29 U.S.C. §667and 29 C.F.R. §1902.3 *et seq*, states which have adopted State OSHA Programs are required to have a sufficient number of adequately trained and qualified personnel necessary for the enforcement of standards to be at least as effective as under the Federal OSHA Act.

33. Under 29 C.F.R. §1902.3 *et seq* states which have accepted State OSHA Programs are required to provide sufficient funds to make enforcement of their plans as effective as enforcement of the Federal OSHA Act.

34. On January 26, 1973, North Carolina's proposed plan for adopting and enforcing workplace safety and health regulations under a State OSHA Program received initial approval.

35. On October 6, 1976, the North Carolina State OSHA Program plan was certified as having completed all developmental steps.

KELLY VERIFIED CLAIM, CONTINUED . . .

36. Under N.C.C.S. §95-126(b)(2)m, the North Carolina Department of Labor is designated as the agency required by law to administer OSHANC.

37. N.C.G.S. §99-133 creates and establishes within the North Carolina Department of Labor a division known as the office of Occupational Safety and Health (sometimes called "North Carolina OSHA" herein).

38. Under N.C.G.S. §95-133, the Commissioner of Labor is required by law to appoint a Director to administer North Carolina OSHA, subject to the direction and supervision of the Commissioner of Labor.

39. Under N.C.G.S. §95-133, the Director has the legal duty to carry out the responsibilities of the State under the State OSHA Program.

40. Under N.C.G.S. §99-133, the Director, subject to the approval of the Commissioner of Labor, is required to select a professional staff of qualified and competent employees to assist in the state-wide administration of OSHANC.

41. Under N.C.G.S. §95-133, subject to the general supervision of the Commissioner of Labor, the Director is made legally responsible for the administration and enforcement of laws, rules and regulations which it is the duty

KELLY VERIFIED CLAIM, CONTINUED . . .

of North Carolina OSHA to administer and enforce, including the power, jurisdiction and authority to, among other actions, do the following: (1) uniformly superintend, enforce and administer applicable occupational safety and health laws of the State of North Carolina; (2) make or cause to be made all necessary inspections, analyses and research for the purpose of seeing that all laws and rules and regulations which the office has the duty, power and authority to enforce are promptly and effectively carried out; (3) make all necessary investigations, develop information and reports upon conditions of employee safety and health, and upon all matters relating to the enforcement of this Article and all lawful regulations issued thereunder; and (4) issue all types of notices, citations, orders, and other pleadings, forms and notices necessary to enforce compliance with OSHANC.

42. Under N.C.G.S. §95-4, the North Carolina Commissioner of Labor is required to appoint such employees in the various divisions of the Department of Labor as may be necessary to perform the work of the Department.

43. Under N.C.G.S. §95-4, the Commissioner of Labor is required to make such rules and regulations as shall be necessary to properly carry out the duties imposed upon the Commissioner and the Department.

44. Under N.C.G.S. §95-4, the Commissioner of Labor is required to secure the enforcement of all laws relating

to the inspection of factories, mills, workshops, and other institutions and to appoint inspectors.

45. Under N.C.G.S. §95-4, the Commissioner of Labor is required to inspect or cause to be inspected as often as practicable the factories and other establishments in this State where goods, wares or merchandise are manufactured, purchased or sold.

46. Under N.C.G.S. §95-4, the Commissioner of Labor is required to enforce the laws and prosecute violation of the laws relating to such inspections.

47. Under N.C.G.S. §95-136, to carry out the purpose and duties of OSHANC, the Commissioner of Labor, the Director of North Carolina OSHA, and their duly authorized agents are entitled to inspect workplaces and investigate whether violations of OSHANC exist.

48. Under N.C.G.S. §95-137, the Director of North Carolina OSHA or his authorized representative has a duty to issue citations to an employer where there are reasonable grounds to believe that the employer has not fulfilled his duties as prescribed in OSHANC and the rules and standards promulgated thereunder.

KELLY VERIFIED CLAIM, CONTINUED . . .

49. Under N.C.G.S. §95-138 and §95-139, civil and criminal penalties are established for employer violations of OSHANC.

50. Under N.C.G.S. §95-146, the Commissioner of Labor is required to furnish to the United States Secretary of Labor information and assurances that the State OSHA Program, North Carolina OSHA, is being administered by adequate methods and by standards and enforcement procedures which are and will continue to be as effective as federal standards.

51. Under N.C.G.S. §95-150, the Commissioner of Labor is required to submit to the General Assembly a budget and request for appropriations to administer adequately the Occupational Safety and Health Act of North Carolina and to give satisfactory assurance that this State will devote adequate funds to the administration and enforcement of standards as required by the Federal OSHA Act.

Defendants' Breaches of Duty

52. Upon information and belief, defendants had an insufficient number of inspectors, inspections, and programs for planned inspection of industries, as found in an investigation conducted by the United States Department of Labor (sometimes "the United States Department of Labor

investigation")after the September 3, 1991 fire at the Imperial Food Products, Inc., plant in Hamlet.

53. In violation of the statutory, regulatory and common law duties described above, the defendants, through Commissioner of Labor John C. Brooks and others, failed to provide or obtain adequate funding for enforcement of OSHANC.

54. In violation of the statutory, regulatory and common law duties described above, the defendants, through Commissioner of Labor John C. Brooks and others, failed to provide adequate personnel and plans for inspection pursuant to OSHANC.

55. As a result of the acts and omissions of defendants through their officers, employees and agents John C. Brooks, Michael D. Ragland, James A. Oppold, and others who were also required by law to provide adequate staffing for D.O.L. and North Carolina OSHA, defendants failed to staff, hire, train and retain an adequate number of inspectors to discharge the duties of defendants described herein and in the Federal OSHA Act, OSHANC, and other statutory and regulatory laws.

56. Upon information and belief, the North Carolina Department of Labor failed even to use funds made available

by the Federal Government for the hiring and training of inspectors and the carrying out of inspections.

57. Upon information and belief, North Carolina OSHA has a high rate of vacancy among inspectors and many other performance deficiencies attributable to the acts and omissions of defendants through their agents in failing to provide adequate staffing.

58. Upon information and belief, defendants did not maintain the staffing level required by law and commensurate with available federal and state funding.

59. Upon information and belief, and as found in the United States Department of Labor investigation, defendants focused inordinate resources on follow up visits to work sites already inspected, and diverted resources to pre-occupancy inspection of migrant labor camps, thereby leaving insufficient time and resources for unannounced general scheduled inspections of other companies, including the Imperial Foods plant in Hamlet, North Carolina.

60. Upon information and belief, North Carolina OSHA had serious operational deficiencies and was less effective than the federal program, as found in the United States Department of Labor investigation. Said deficiencies are a result of the failure of the North Carolina Department of Labor and North Carolina OSHA, through their agents, to

KELLY VERIFIED CLAIM, CONTINUED . . .

discharge their statutory, regulatory and common law duties, including those owed to claimant and Brenda Gail Kelly, deceased.

61. Upon information and belief, North Carolina OSHA's administrative procedures were at the time of the Hamlet plant fire deficient and inadequate, as found in the United States Department of Labor investigation.

62. Upon information and belief, the programmed safety and health inspections conducted by defendant were insufficient, as found in the United States Department of Labor investigation.

63. Upon information and belief, defendants failed to carry out their duties under the Federal OSHA Act, the State OSHA Program, and OSHANC on a level at least as effective in providing safe and healthful employment and places of employment as the standards promulgated by Congress and the United States Department of Labor under the Federal OSHA Act.

64. The defendants' failure to fulfill their statutory, regulatory and common law duties was the proximate and direct cause of the death suffered by Brenda Gail Kelly, deceased, and the damages suffered by claimant.

KELLY VERIFIED CLAIM, CONTINUED . . .

65. The defendants, through their agents and in the exercise reasonable care, should have conducted regular inspections of the Imperial Food Products plant in Hamlet, North Carolina.

66. Upon information and belief, Imperial Food Products, Inc. had other facilities, including in the City of Moosic in the Commonwealth of Pennsylvania. At least two inspections conducted on the Pennsylvania Imperial Foods plants in the mid-1980's by the United States Department of Labor, Federal OSHA division, led to citations being issued against Imperial Foods, Inc. for improper safety practices.

67. Upon information and belief, in one 1985 incident at the Imperial Foods plant in Moosic, Pennsylvania, employees were exposed to hot oil lines running near the floor between the fryer and the oven which were not protected. One of said lines burst and caused an employee to sustain burns over 35% of her body.

68. Upon information and belief, a 1987 inspection of the Imperial Foods plant in Moosic, Pennsylvania by Federal OSHA revealed that the means of ingress and egress were improperly constructed, labeled, and had inadequate accessibility. The OSHA inspector issuing citations for these violations, E. F. Donnelley, found that Imperial Foods top management demonstrated hostility and had "utter contempt for OSHA."

KELLY VERIFIED CLAIM, CONTINUED . . .

69. In the exercise of reasonable care, the defendants, through their agents, knew or should have known of Imperial Food Products' history of flagrant noncompliance with Federal OSHA requirements at the Moosic, Pennsylvania location that were identical or substantially similar to those in effect under OSHANC. Upon information and belief, said history of non-compliance was a matter of public record or was otherwise freely available to defendants who, having a duty to provide safe and healthful employment and places of employment at least equal to the standards mandated by the Federal OSHA Act, should in the exercise of reasonable care have known and acted upon such information by regularly inspecting and enforcing OSHANC standards at the Imperial Foods plant in Hamlet, North Carolina.

70. Upon information and belief, the conduct which Imperial Foods was cited for at its plant in Moosic, Pennsylvania was the same or a similar type of conduct to that which it was cited for in North Carolina after the September 3, 1991 fire, and which conduct caused the death of Brenda Gail Kelly.

71. In the exercise of reasonable care, defendants should have regularly inspected the Imperial Foods plant in Hamlet, North Carolina, to determine whether hazards such as those present at the Imperial Food Products, Inc., plant in Moosic, Pennsylvania and other hazards were present in Hamlet. Defendants' failure to discharge such duties prior to

the fire which took the life of Brenda Gail Kelly was the proximate and direct cause of the injuries and death suffered by Brenda Gail Kelly and the damages suffered by claimant.

72. Upon information and belief, the September 3, 1991 fire which resulted in the death of twenty-five persons, including Brenda Gail Kelly, and the injuries of fifty-six persons at the Hamlet, North Carolina facility was not the first fire at that plant. In fact, Imperial Food Products, Inc., had suffered a fire at its Hamlet plant sometime on or before November 26, 1980, and yet another fire on or before July 5, 1983. The defendants, in the exercise of reasonable care, knew or should have known of the previous fires at the same employer's facility at the same site, and therefore should have inspected the employer to protect the decedent Brenda Gail Kelly from any further such occurrences.

73. The defendants, through their agents named herein, owed a duty to Brenda Gail Kelly to inspect the Imperial Food Products, Inc., plant in Hamlet, North Carolina, and to require abatement of the hazards there, including of the hazards that led to the death of Brenda Gail Kelly. The defendants' failure to conduct such inspections or cause them to be conducted proximately and directly caused her death.

74. Upon information and belief, the defendants, through their agents, Commissioner of Labor John Brooks, Deputy Commissioner of Labor Michael Ragland, North

KELLY VERIFIED CLAIM, CONTINUED . . .

Carolina OSHA Director James Oppold, and others, failed to require that Imperial Food Products, Inc., be inspected despite all the information available to defendants which demonstrated that the Imperial Food Products, Inc., plant in Hamlet, North Carolina was highly likely to have working conditions in gross deviation from those prescribed by law.

75. Upon information and belief, the defendants, through Compliance Bureau Chief Richard Amos and District Safety Supervisor Frank Trogdon, failed to require that compliance officers or others in the employment of defendants inspect the Imperial Food Products, Inc. plant in Hamlet, North Carolina prior to the fire which gave rise to this action. Imperial Foods Products, Inc. had a presence in the State of North Carolina for a period of years before the fire which took the life of Brenda Gail Kelly, and in that entire time, no inspection was conducted despite the manifest and patent need to inspect regularly the Imperial Food Products, Inc., plant in Hamlet.

76. Upon information and belief, John Brooks, Michael Ragland, James Oppold, Richard Amos, and Frank Trogdon had supervisory and other responsibilities to assign compliance safety and health officers, including but not limited to Douglas Jones, Charles Johnson, J. A. Bolton, David Poole, Tom Hayes, and Rodger Griffin, to inspect industries in Richmond County and surrounding areas, including the Imperial Food Products, Inc., plant in Hamlet, but did not direct

KELLY VERIFIED CLAIM, CONTINUED . . .

that said plant be inspected. The defendants, through their agents, failed to require such inspections, thereby breaching duties owed to claimant and to the decedent Brenda Gail Kelly.

77. Defendants in the exercise of reasonable care and by reasonable inspection knew or should have known of the violative conditions at the Imperial Food Products, Inc., plant in Hamlet, including, without limitation, the following: (1) the failure of Imperial Foods to furnish each of its employees conditions of employment which were free from recognized hazards, (2) the failure of Imperial Food Products, Inc., to maintain a fire suppression sprinkler system as required by law, (3) the failure of Imperial Foods to provide a proper evacuation plan and means of egress should the plant catch fire, (4) the failure of Imperial Foods to provide unlocked, unblocked, and operable exits as required by law, (5) the failure of Imperial Foods to require adequate safety precautions considering the highly flammable substances being used in the presence of cooking and frying operations and the highly corrosive materials being used, (6) the failure of Imperial Food Products, Inc., to label adequately exits or identify doors which were not exits so employees could find their way out of the plant in event of a fire, (7) the failure of Imperial Food Products, Inc., to provide adequate fire alarm facilities to alert employees to smoke or fire, (8) the failure of Imperial Foods to conduct fire exit drills in order to create an orderly means of escape, and (9) the failure of Imperial Food Products, Inc., to

train employees in fire extinguisher use and fire containment in emergencies to protect the lives of employees.

78. The defendants negligently acted or failed to act in all manners alleged in paragraphs 1-77 of this Verified Claim and thereby unreasonably, oppressively and manifestly abused their discretion. Defendants were also negligent and abused their discretion in other manners, including, but not limited to, the following:

a. Defendants negligently failed to maintain safety standards at the same level as required by the Federal Government.

b. Defendants negligently failed adequately to staff, train, and maintain personnel, despite the availability of federal and state funds for this purpose, and negligently maintained an unacceptably high rate of vacancy among inspectors.

c. Defendants negligently failed to provide adequate funding for enforcement of OSHANC in violation of their statutory, regulatory and common law duties.

d. Defendants negligently failed to provide adequate plans for inspection pursuant to OSHANC in violation of their statutory, regulatory and common law duties.

KELLY VERIFIED CLAIM, CONTINUED . . .

e. Defendants negligently failed to use funds made available by the Federal Government and State Government for the hiring and training of inspectors and the carrying out of inspections.

f. Defendants negligently focused inordinate resources on follow up visits to work sites already inspected and negligently diverted resources to pre-occupancy inspection of migrant labor camps, thereby negligently leaving insufficient time and resources for unannounced general scheduled inspections of other companies and work sites, including the Hamlet plant.

g. Defendants negligently failed to provide for the safe and healthful employment and places of employment of the decedent Brenda Gail Kelly at least as effective as that provided and required by the federal government pursuant to the Federal OSHA Act.

h. Defendants negligently failed to discharge their duties of inspection and enforcement under statutory, regulatory and common law, by not conducting regular inspection of the Hamlet plant, proximately causing the injuries and death of decedent, Brenda Gail Kelly.

i. Defendants in the exercise of reasonable care knew or should have known the history of noncompliance with the Federal OSHA Act by Imperial Food Products, Inc. in

KELLY VERIFIED CLAIM, CONTINUED . . .

the Commonwealth of Pennsylvania, including as to the particular types of hazards Imperial Foods was cited for maintaining there - which hazards were also present at the Hamlet plant and which were a cause of the September 3, 1991 fire - and therefore should have regularly inspected the Hamlet plant, but negligently failed to do so at any time prior to the fire which took the life of Brenda Gail Kelly.

j. Defendants in the exercise of reasonable care knew or should have known of the previous fires at the Imperial Food Products, Inc., plant-in Hamlet, North Carolina, but-negligently failed to inspect said plant prior to the September 3, 1991 fire to determine whether the safety of the workers at that plant was being compromised.

k. Defendants negligently failed to conduct any inspection of the Hamlet plant prior to the September 3, 1991 fire, which inspection, if conducted, would have disclosed the violative conditions and defects and led to the issuance of citations and the abatement of hazards or the shutdown of the Imperial Food Products, Inc., plant in Hamlet, North Carolina. Defendants' negligent failure to conduct such inspections was a breach of their duties to claimant and Brenda Gail Kelly and was a proximate cause of her death.

79. The acts of negligence complained of herein, and other acts of negligence by defendants which will or may be disclosed during discovery and trial of this action, were

KELLY VERIFIED CLAIM, CONTINUED . . .

breaches of duty to claimant and Brenda Gail Kelly, deceased, and were the proximate and direct cause of his death, for which claimant is entitled to recover.

80. William Kelly, Jr., administrator of the estate of Brenda Gail Kelly, deceased, is entitled under North Carolina law to recover on behalf of the heirs of Brenda Gail Kelly for the pain and suffering he underwent as a result of the negligence and unreasonable, oppressive and manifest abuse of discretion of defendants, and for the funeral expenses, and the monetary value of the decedent to the heirs, including but not limited to loss of net income, services, protection, care, assistance, society, companionship, comfort, guidance, kindly offices, and advice.

81. Upon information and belief, Brenda Gail Kelly, deceased, suffered extreme mental and physical anguish as a result of the smoke and fire at the Imperial Food Products plant in Hamlet, North Carolina, for which the claimant is entitled to recover.

82. Brenda Gail Kelly was a much loved and valued family member and provided to her heirs at law significant, substantial, meaningful and valuable services, protection, care, assistance, society, companionship, comfort, guidance, kindly offices, and advice which, as a direct and proximate result of the negligent acts and omissions of the defendants and their unreasonable, oppressive, and manifest of discretion, were lost

KELLY VERIFIED CLAIM, CONTINUED . . .

forever to the heirs of Brenda Gail Kelly and for which her estate is entitled to compensation, for total damages in the amount of $100,000.00.

WHEREFORE, claimant prays that he: (1) Have and recover of defendants damages in excess of $100,000.00 as a result of the negligent acts and omissions and the unreasonable, oppressive and manifest abuses of discretion by the defendants, and (2) such other and further relief as may be appropriate.

/s/ Henry L. Kitchin

/s/ Stephan R. Futrell
LEATH, BYNUM, KITCHIN & NEAL, P.A.
111 Washington Street
Post Office Box 1657
Rockingham, North Carolina 28379
Telephone (919) 997-2206

ATTORNEYS FOR CLAIMANT, WILLIAM KELLY, JR., ADMINISTRATOR OF THE ESTATE OF BRENDA GAIL KELLY, Deceased

/s/ Joseph W. Moss

KELLY VERIFIED CLAIM, CONTINUED . . .

/s/ J. Alexander S. Barrett
ADAMS, KLEEMEIER, HAGAN, HANNAH & FOUTS
Post Office Box 3463
301 N. Elm Street, Suite 500
Greensboro, North Carolina 27401
Telephone: (919) 343 1600
ATTORNEYS FOR CLAIMANT WILLIAM KELLY, JR., ADMINISTRATOR OF THE ESTATE OF BRENDA GAIL KELLY, Deceased

KELLY VERIFIED CLAIM, CONTINUED . . .

NORTH CAROLINA INDUSTRIAL COMMISSION
I.C. NO. TA-

WILLIAM KELLY, JR., Administrator of the Estate of BRENDA GAIL KELLY, Deceased,	)	
Claimant,	)	AFFIDAVIT AND VERIFICATION
v.	)	
NORTH CAROLINA DEPARTMENT OF LABOR, and NORTH CAROLINA DEPARTMENT OF LABOR, DIVISION OF OCCUPATIONAL SAFETY AND HEALTH,	)	
Defendants.	)	

William Kelly, Jr., having first been duly sworn, deposes and says:

1. The name of the claimant is William Kelly, Jr., Administrator of the Estate of Brenda Gail Kelly, deceased. Mr. Kelly resides at Route 1, Box 214B, Rockingham, North Carolina.

KELLY VERIFIED CLAIM, CONTINUED . . .

2. The claims asserted against the North Carolina Department of Labor, and the North Carolina Department of Labor, Division of Occupational Safety and Health, and the names of the individual employees, upon whose negligence the claims are based, are included in the Verified Claim to which this Affidavit and Verification is attached.

3. The claimant is seeking to recover all damages permitted under the North Carolina Tort Claims Act, N.C.G.S. §143-291, *et seq.*

4. The time and place the injury occurred are described in the Verified Claim to which this Affidavit and Verification is attached.

5. The facts and circumstances surrounding the injury and giving rise to this claim are stated and described in the Verified Claim to which this Affidavit and Verification is attached.

6. The contents of the Verified Claim to which this Affidavit and Verification is attached are adopted and incorporated herein by reference as though specifically set forth herein.

7. The contents of the Verified Claim are true to the knowledge of the undersigned, except as to those matters

KELLY VERIFIED CLAIM, CONTINUED . . .

stated on information and belief, and as to those matters, he believes them to be true.

Further affiant sayeth not.

This 24th day of August 1993.

/s/ WILLIAM KELLY, JR.

Subscribed and sworn to
before me this 24th day of August, 1993.

/s/ Pamela S. Griner
Notary Public

My Commission Expires: 3-29-98

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EXHIBIT A

STATE OF NORTH CAROLINA

Richmond County

File No. 91-E-219
In The General Court of Justice
Superior Court Division
Before The Clerk

In The Matter Of The Estate Of:	
Name Brenda Gail Kelly	LETTERS Administration G.S. 28A-6-1

The Court in the exercise of its jurisdiction of the probate of wills and the administration of estates, and upon application of the fiduciary, has adjudged legally sufficient the qualification of the fiduciary named below and orders that Letters be issued in the above estate.

The fiduciary is fully authorized by the laws of North Carolina to receive and administer all of the assets belonging to the estate, and these Letters are issued to attest tot hat authority and to certify that it is now in full force and effect.

Witness my hand and the Seal of the Superior Court.

Name And Title Of Fiduciary William Kelly, Jr. Administrator	Date Of Qualification September 11, 1991
Address Route 1 Box 214 B	Clerk Of Superior Court Catherine S. Wilson
City, State, Zip Rockingham, North Carolina 28379	EX OFFICIO JUDGE OF PROBATE
Name And Title Of Fiduciary	
Address	Date Of Issuance January 20, 1993
City, State, Zip	Signature /s/ Kathy C. Gainey
SEAL	✓ Deputy CSC ___ Assistant CSC

AOC-E-403, Rev. 6/87

VERIFIED CLAIM OF MILDRED LASSITER MOATES OF AUGUST 26, 1993

NORTH CAROLINA INDUSTRIAL COMMISSION
I.C. NO. TA-

MILDRED LASSITER MOATES and OLIN DELLANO MOATES,	)	
Claimants,	)	
v.	)	VERIFIED CLAIM
NORTH CAROLINA DEPARTMENT OF LABOR, and NORTH CAROLINA DEPARTMENT OF LABOR, DIVISION OF OCCUPATIONAL SAFETY AND HEALTH,	)	
Defendants.	)	

Claimants, Mildred Lassiter Moates and Olin Dellano Moates by and through his/her undersigned counsel, alleges and says as follows:

THE PARTIES AND DEFENDANTS' OFFICERS, EMPLOYEES AND AGENTS

1. Claimant Mildred Lassiter Moates (sometimes herein referred to as "claimant") is a citizen and resident of Richmond County, North Carolina. Olin Dellano Moates, also a claimant herein, is a citizen and resident of Richmond

MOATES VERIFIED CLAIM, CONTINUED . . .

County, North Carolina. Claimant and Olin Dellano Moates are husband and wife, having married December 29, 1960.

2. Defendant the North Carolina Department of Labor (sometimes "D.O.L.") is a political subdivision of the State of North Carolina.

3. Defendant the Division of Occupational Safety and Health, also known as the Office of Occupational Safety and Health (sometimes "North Carolina OSHA") is a political subdivision of the State of North Carolina and is an office within the North Carolina Department of Labor responsible for promulgation and enforcement of workplace safety standards, and for the performance of duties under the Occupational Safety and Health Act of North Carolina (sometimes "OSHANC") and other applicable laws.

4. Consistent with the mandate of N.C.G.S. 143-297 and other applicable law, claimants identify by name in the following paragraphs the State employees upon whose negligence the claims stated herein are based. Claimants identify these persons without prejudice to their right to name other individuals whose negligence may be revealed through discovery as supporting claims under the Tort Claims Act.

5. At times relevant to this action, John C. Brooks was the Commissioner of the North Carolina Department of Labor acting as an officer, employee and agent for defendants

MOATES VERIFIED CLAIM, CONTINUED . . .

D.O.L. and North Carolina OSHA (sometimes jointly "defendants") acting in the scope of his office, employment, service, agency and authority and having responsibilities for the enforcement of OSHANC, including at the Imperial Food Products, Inc. plant at 40 Bridges Street, Hamlet, Richmond County, North Carolina (sometimes "Hamlet plant"), a chicken processing plant that initially began operations in the year 1980.

6. Upon information and belief, at times relevant to this action, Michael D. Ragland was Deputy Commissioner of Health and Safety of D.O.L. and was an officer, employee and agent of defendants acting in the scope of his office, employment, service, agency and authority and having responsibilities for the enforcement of OSHANC, including at the Hamlet plant.

7. Upon information and belief, at times relevant to this action, James A. Oppold was the Director of North Carolina OSHA and an officer, employee and agent of defendants acting in the scope of his office, employment, service, agency and authority and having responsibilities for the enforcement of OSHANC including at the Hamlet plant.

8. Upon information and belief, at times relevant to this action, Richard Amos was a Bureau Chief with North Carolina OSHA and was an officer, employee and agent of defendants acting in the scope of his office, employment,

service, agency and authority, and having responsibilities for enforcement of OSHANC, including at the Hamlet plant.

9. Upon information and belief, at times relevant to this action, Frank Trogdon was District Safety Supervisor with North Carolina OSHA and was an officer, employee and agent of defendants acting within the scope of his office, employment, service, agency and authority and having responsibilities for enforcement of OSHANC, including at the Hamlet plant.

10. Upon information and belief, at times relevant to this action, David Poole, Charles W. Johnson, J. A. Bolton, and Douglas Jones were Compliance Safety and Health Officers with North Carolina OSHA and were officers, employees and agents of defendants acting within the scope of their offices, employments, services, agencies and authorities and having responsibilities for enforcement of OSHANC, including at the Hamlet plant.

11. Upon information and belief, at times relevant to this action Roseanne Morgan was a Health Supervisor and was an officer, employee and agent of defendants acting within the scope of her office, employment, service, agency and authority, and having responsibilities for enforcement of OSHANC, including at the Hamlet plant.

MOATES VERIFIED CLAIM, CONTINUED . . .

12. Upon information and belief, at times relevant to this action Tom Hayes and Rodger Griffin were officers, employees and agents of defendants acting in the scope of their offices, employments, services, agencies and authorities, and having responsibilities for enforcement of OSHANC, including at the Hamlet plant.

JURISDICTION

13. Pursuant to N.C.G.S. §143-291, the North Carolina Industrial Commission is constituted a court for the purpose of hearing and passing upon tort claims against all departments, institutions and agencies of the State, including the defendants.

THE IMPERIAL FOOD PRODUCTS FIRE

14. This action arises out of the negligent failure of the defendants to discharge duties of safety owed to claimants, said negligence also amounting to an unreasonable, oppressive and manifest abuse of discretion and being a direct and proximate cause of the September 3, 1991 fire at the Hamlet, North Carolina, plant of Imperial Food Products Inc., which killed at least twenty-five (25) people and injured at least fifty-six (56) others, including claimant.

15. On September 3, 1991, claimant was an employee of Imperial Food Products, Inc., working at a chicken

processing plant located in Hamlet, Richmond County, North Carolina. She worked in the trim room.

16. On that date a fire developed in the processing area at the Imperial Foods plant in Hamlet.

17. Upon information and belief, a hydraulic line near a deep fat fryer in the processing section of the plant ruptured, igniting hydraulic fluid just a few feet away from a natural gas fume cooker used in chicken preparation and spraying the flammable hydraulic fluid at high pressure against the floor and the nearby cooker.

18. Upon information and belief, the fire, which grew in intensity and spread rapidly through the interior and various work areas of the plant, caused a spread of toxic gases and black smoke throughout the building.

19. The claimant Mildred Lassiter Moates was injured by this fire. Her injuries include diffuse brain damage; legal blindness; anoxic encephalopathy secondary to smoke inhalation; cognitive, physical and psychosocial deficits, severe; post-traumatic stress disorder, severe, chronic and permanent, manifested by nightmares and hallucinations; decreased level of awareness to the environment; decreased level of consciousness, including safety awareness; tracheobronchial and pulmonary burns secondary to smoke inhalation, and she was otherwise injured about her

MOATES VERIFIED CLAIM, CONTINUED . . .

musculoskeletal and nervous systems. For the necessary treatment of her injuries, claimant has submitted to multiple and extensive operations, medical and surgical procedures including bilateral lower extremity tendon releases which have resulted in a hobbled gait. As a result of her injuries, claimant has been caused to endure severe and debilitating pain and suffering of both body and mind which will continue for the balance of her life. She has incurred numerous and costly medical bills in an amount not yet determined, which medical bills will continue to be incurred over the balance of her life for her necessary medical care and treatment, attendant nursing care, and maintenance. Further, because of her injuries, claimant has been rendered permanently and totally disabled, has lost a great deal of wages, has suffered a permanent and total loss of wage-earning capacity, and her enjoyment of life has been permanently diminished. The fiery explosion, the rapid burning of the plant, the mass confusion and total darkness as to whether claimant would be able to escape this inferno and even death itself, and the other events immediately surrounding the occurrence of this industrial workplace tragedy were sudden, shocking and extraordinarily frightening and physically damaging to claimant and her nervous system. She experienced profound horror, and this experience had a direct emotional impact upon her. It was reasonably foreseeable that the defendants' negligence and abuses of discretion, hereinafter described, would cause this claimant and others to suffer severe emotional distress and mental anguish, and the claimant did in fact suffer severe emotional distress and mental anguish as a

direct and proximate result of the defendants' said conduct. As a result of the severe emotional distress and mental anguish which claimant suffered, she has been further caused to suffer the aforementioned post-traumatic stress disorder, this being a generally recognized condition by mental health professionals, and the claimant has been so diagnosed. As mentioned above, the claimant's post-traumatic stress disorder is severe, chronic and permanent.

20. Resulting from the injuries suffered by claimant Mildred Lassiter Moates, her husband, claimant Olin Dellano Moates, has been denied the consortium, conjugal services, society, companionship, affection and sexual relations with his wife.

21. This fire was one of the worst industrial disasters in American history, and could and should have been prevented by defendants adequately enforcing workplace safety laws enacted for the protection of claimant.

22. Defendants negligently failed to fulfill their duties and unreasonably, oppressively and manifestly abused their discretion by not taking steps which they were legally required to take to protect claimant.

23. Upon information and belief, the defendants for the first time inspected the Hamlet plant after the September 3, 1991 fire, and from the ruins of the plant and charred remains

of the fire victims determined that Imperial Food Products, Inc. had conditions in violation of OSHANC leading to the issuance of fifty-four (54) citations for willful violations of OSHANC Standards, twenty-three (23) citations for serious violations of OSHANC standards, and six (6) citations for other than serious violations of OSHANC standards, resulting in penalties being assessed against Imperial Food Products, Inc. totaling $808,150.

24. The claimant's injuries, and her spouse's damages resulting therefrom, were a direct and proximate result of the negligent breach by the defendants of statutory, regulatory, and common law duties described herein, and amounted to an unreasonable, oppressive and manifest abuse of discretion.

THE DUTIES AND THE NEGLIGENT ACTS AND OMISSIONS OF THE DEFENDANTS

25. Defendants owed duties to claimant and to her spouse which were imposed by federal and state statutes and regulations and by the common law, and which defendants negligently breached proximately and directly causing the injuries of claimant, and causing the claimant and her husband to suffer damages, amounting to an unreasonable, oppressive and manifest abuse of defendants' discretion. The claimants incorporate the allegations contained in paragraphs 1 through

23 of this Verified Claim herein, and makes additional allegations below.

Duties of Defendants

26. In 1970, the Congress of the United States enacted and the President of the United States signed into law the Occupational Safety and Health Act of 1970, codified at 29 U.S.C. §651 *et seq.* (sometimes "Federal OSHA Act").

27. Under 29 U.S.C. §667, a section of the Federal OSHA Act, a state may assume responsibility for development and enforcement of occupational safety and health standards on certain terms and conditions, provided that the state's program (sometimes "State OSHA Program") is or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated by Congress and the United States Department of Labor under the Federal OSHA Act.

28. Under 28 U.S.C. §667, a State OSHA Program must provide sufficient legal authority and qualified personnel necessary for enforcement of such standards.

29. Under 28 U.S.C. §667, a State OSHA Program must have adequate funds devoted to the administration and enforcement of such standards.

MOATES VERIFIED CLAIM, CONTINUED . . .

30. Under the Federal OSHA Act and relevant federal regulations, including 29 C.F.R. §1901.1 *et seq*, it is the continuing duty of those states with a State OSHA Program to provide safety standards, funding, and enforcement at least as effective as the standards, funding and enforcement provided by the Federal OSHA Act and the regulations promulgated thereunder.

31. Pursuant to federal regulations located at 29 CFR §1901.1 *et seq*, a state which has adopted a State OSHA Program must maintain adequate funding and may not diminish its level of enforcement activity below that existing at the time of the agreement with the federal government leading to adoption of a State OSHA Program.

32. Under 29 U.S.C. §667 and 29 C.F.R. §1901.1 *et seq*, a state with a State OSHA Program must provide for the development and enforcement of such standards as will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated by Congress and the United States Department of Labor, and state agents responsible for execution of such programs must have sufficient legal authority to enforce these standards.

33. Under 29 U.S.C. §667 and 29 C.F.R. §1902.3 *et seq*, states which have adopted State OSHA Programs are required to have a sufficient number of adequately trained and

qualified personnel necessary for the enforcement of standards to be at least as effective as under the Federal OSHA Act.

34. Under 29 C.F.R. §1902.3 *et seq*, states which have accepted State OSHA Programs are required to provide sufficient funds to make enforcement of their plans as effective as enforcement of the Federal OSHA Act.

35. On January 26, 1973, North Carolina's proposed plan for adopting and enforcing workplace safety and health regulations under a State OSHA Program received initial approval.

36. On October 6, 1976, the North Carolina State OSHA Program plan was certified as having completed all developmental steps.

37. Under N.C.G.S. §95-126 (b) (2)m, the North Carolina Department of Labor is designated as the agency required by law to administer OSHANC.

38. N.C.G.S. §99-133 creates and establishes within the North Carolina Department of Labor a division known as the Office of Occupational Safety and Health (sometimes called "North Carolina OSHA" herein).

39. Under N.C.G.S. §95-133, the Commissioner of Labor is required by law to appoint a Director to administer

MOATES VERIFIED CLAIM, CONTINUED . . .

North Carolina OSHA, subject to the direction and supervision of the Commissioner of Labor.

40. Under N.C.G.S. §95-133, the Director has the legal duty to carry out the responsibilities of the State under the State OSHA Program.

41. Under N.C.G.S. §99-133, the Director, subject to the approval of the Commissioner of Labor, is required to select a professional staff of qualified and competent employees to assist in the state-wide administration of OSHANC.

42. Under N.C.G.S. §95-133, subject to the general supervision of the Commissioner of Labor, the Director is made legally responsible for the administration and enforcement of laws, rules and regulations which it is the duty of North Carolina OSHA to administer and enforce, including the power, jurisdiction and authority to, among other actions, do the following: (1) uniformly superintend, enforce and administer applicable occupational safety and health laws of the State of North Carolina; (2) make or cause to be made all necessary inspections, analyses and research for the purpose of seeing that all laws and rules and regulations which the office has the duty, power and authority to enforce are promptly and effectively carried out; (3) make all necessary investigations, develop information and reports upon conditions of employee safety and health, and upon all matters relating to the

enforcement of this Article and all lawful regulations issued thereunder; and (4) issue all types of notices, citations, orders, and other pleadings, forms and notices necessary to enforce compliance with OSHANC.

43. Under N.C.G.S. §95-4, the North Carolina Commissioner of Labor is required to appoint such employees in the various divisions of the Department of Labor as may be necessary to perform the work of the Department.

44. Under N.C.G.S. §95-4, the Commissioner of Labor is required to make such rules and regulations as shall be necessary to properly carry out the duties imposed upon the Commissioner and the Department.

45. Under N.C.G.S. §95-4, the Commissioner of Labor is required to secure the enforcement of all laws relating to the inspection of factories, mills, workshops, and other institutions and to appoint inspectors.

46. Under N.C.G.S. §95-4, the Commissioner of Labor is required to inspect or cause to be inspected as often as practicable the factories and other establishments in this State where goods, wares or merchandise are manufactured, purchased or sold.

MOATES VERIFIED CLAIM, CONTINUED . . .

47. Under N.C.G.S. §95-4, the Commissioner of Labor is required to enforce the laws and prosecute violation of the laws relating to such inspections.

48. Under N.C.G.S. §95-136, to carry out the purpose and duties of OSHANC, the Commissioner of Labor, the Director of North Carolina OSHA, and their duly authorized agents are entitled to inspect workplaces and investigate whether violations of OSHANC exist.

49. Under N.C.G.S. §95-137, the Director of North Carolina OSHA or his authorized representative has a duty to issue citations to an employer where there are reasonable grounds to believe that the employer has not fulfilled his duties as prescribed in OSHANC and the rules and standards promulgated thereunder.

50. Under N.C.G.S. §95-138 and §95-139, civil and criminal penalties are established for employer violations of OSHANC.

51. Under N.C.G.S. §95-146, the Commissioner of Labor is required to furnish to the United States Secretary of Labor information and assurances that the State OSHA Program, North Carolina OSHA, is being administered by adequate methods and by standards and enforcement procedures which are and will continue to be as effective as federal standards.

MOATES VERIFIED CLAIM, CONTINUED . . .

52. Under N.C.G.S. §95-150, the Commissioner of Labor is required to submit to the General Assembly a budget and request for appropriations to administer adequately the Occupational Safety and Health Act of North Carolina and to give satisfactory assurance that this State will devote adequate funds to the administration and enforcement of standards as required by the Federal OSHA Act.

Defendants' Breaches of Duty

53. Upon information and belief, defendants had an insufficient number of inspectors, inspections, and programs for planned inspection of industries, as found in an investigation conducted by the United States Department of Labor (sometimes "the United States Department of Labor investigation") after the September 3, 1991 fire at the Imperial Food Products, Inc. plant in Hamlet, North Carolina.

54. In violation of the statutory, regulatory and common law duties described above, the defendants, through Commissioner of Labor John C. Brooks and others, failed to provide or obtain adequate funding for enforcement of OSHANC.

55. In violation of the statutory, regulatory and common law duties described above, the defendants, through Commissioner of Labor John C. Brooks and others, failed to

provide adequate personnel and plans for inspection pursuant to OSHANC.

56. As a result of the acts and omissions of defendants through their officers, employees and agents John C. Brooks, Michael D. Ragland, James A. Oppold, and others who were also required by law to provide adequate staffing for D.O.L. and North Carolina OSHA, defendants failed to staff, hire, train and retain an adequate number of inspectors to discharge the duties of defendants described herein and in the Federal OSHA Act, OSHANC, and other statutory and regulatory laws.

57. Upon information and belief, the North Carolina Department of Labor failed even to use funds made available by the Federal Government for the hiring and training of inspectors and the carrying out of inspections.

58. Upon information and belief, North Carolina OSHA has a high rate of vacancy among inspectors and many other performance deficiencies attributable to the acts and omissions of defendants through their agents in failing to provide adequate staffing.

59. Upon information and belief, defendants did not maintain the staffing level required by law and commensurate with available federal and state funding.

MOATES VERIFIED CLAIM, CONTINUED . . .

60. Upon information and belief, and as found in the United States Department of Labor investigation, defendants focused inordinate resources on follow up visits to work sites already inspected, and diverted resources to pre-occupancy inspection of migrant labor camps, thereby leaving insufficient time and resources for unannounced general scheduled inspections of other companies, including the Imperial Foods plant in Hamlet, North Carolina.

61. Upon information and belief, North Carolina OSHA had serious operational deficiencies and was less effective than the federal program, as found in the United States Department of Labor investigation. Said deficiencies are a result of the failure of the North Carolina Department of Labor and North Carolina OSHA, through their agents, to discharge their statutory, regulatory and common law duties, including those owed to claimants.

62. Upon information and belief, North Carolina OSHA's administrative procedures were at the time of the Hamlet plant fire deficient and inadequate, as found in the United States Department of Labor investigation.

63. Upon information and belief, the programmed safety and health inspections conducted by defendant were insufficient, as found in the United States Department of Labor investigation.

MOATES VERIFIED CLAIM, CONTINUED . . .

64. Upon information and belief, defendants failed to carry out their duties under the Federal OSHA Act, the State OSHA Program, and OSHANC on a level at least as effective in providing safe and healthful employment and places of employment as the standards promulgated by Congress and the United States Department of Labor under the Federal OSHA Act.

65. The defendants' failure to fulfill their statutory, regulatory and common law duties was the proximate and direct cause of the injuries suffered by claimant, and the damages suffered by each claimant.

66. The defendants, through their agents and in the exercise reasonable care, should have conducted regular inspections of the Imperial Food Products plant in Hamlet, North Carolina.

67. Upon information and belief, Imperial Food Products, Inc. had other facilities, including in the City of Moosic in the Commonwealth of Pennsylvania. At least two inspections conducted on the Pennsylvania Imperial Foods plants in the mid-1980's by the United States Department of Labor, Federal OSHA division, led to citations being issued against Imperial Foods, Inc. for improper safety practices.

68. Upon information and belief, in one 1985 incident at the imperial Foods plant in Moosic, Pennsylvania,

MOATES VERIFIED CLAIM, CONTINUED . . .

employees were exposed to hot oil lines running near the floor between the fryer and the oven which were not protected. One of said lines burst and caused an employee to sustain burns over 35% of her body.

69. Upon information and belief, a 1987 inspection of the Imperial Foods plant in Moosic, Pennsylvania by Federal OSHA revealed that the means of ingress and egress were improperly constructed, labeled, and had inadequate accessibility. The OSHA inspector issuing citations for these violations, E. F. Donnelley, found that Imperial Foods top management demonstrated hostility and had "utter contempt for OSHA."

70. In the exercise of reasonable care, the defendants, through their agents, knew or should have known of Imperial Food Products, history of flagrant noncompliance with Federal OSHA requirements at the Moosic, Pennsylvania location that were identical or substantially similar to those in effect under OSHANC. Upon information and belief, said history of non-compliance was a matter of public record or was otherwise freely available to defendants who, having a duty to provide safe and healthful employment and places of employment at least equal to the standards mandated by the Federal OSHA Act, should in the exercise of reasonable care have known and acted upon such information by regularly inspecting and enforcing OSHANC standards at the Imperial Foods plant in Hamlet, North Carolina.

MOATES VERIFIED CLAIM, CONTINUED . . .

71. Upon information and belief, the conduct which Imperial Foods was cited for at its plant in Moosic, Pennsylvania was the same or a similar type of conduct to that which it was cited for in North Carolina after the September 3, 1991 fire, and which conduct caused the claimant's injuries.

72. In the exercise of reasonable care, defendants should have regularly inspected the Imperial Food Products, Inc. plant Hamlet, North Carolina, to determine whether hazards such as those present at the Imperial Food Products, Inc. plant in Moosic, Pennsylvania and other hazards were present in Hamlet. Defendants' failure to discharge such duties prior to the fire which injured the claimant was the proximate and direct cause of the injuries suffered by claimant and the damages suffered by each claimant.

73. Upon information and belief, the September 3, 1991 fire which resulted in the death of twenty-five persons, and the injuries of fifty-six persons including claimant at the Hamlet, North Carolina facility was not the first fire at that plant. In fact, Imperial Food Products, Inc. had suffered a fire at its Hamlet plant sometime on or before November 26, 1980, and yet another fire on or before July 5, 1983. The defendants, in the exercise of reasonable care, knew or should have known of the previous fires at the same employer's facility at the same site, and therefore should have inspected the employer to protect claimant from any further such occurrences.

MOATES VERIFIED CLAIM, CONTINUED . . .

74. The defendants, through their agents named, herein, owed a duty to each claimant to inspect the Imperial Food Products, Inc. plant in Hamlet, North Carolina, and to require abatement of the hazards there, including of the hazards that led to claimant's injuries. The defendants' failure to conduct such inspections or cause them to be conducted proximately and directly caused the claimant's injuries and the damages suffered by each claimant.

75. Upon information and belief, the defendants, through their agents, Commissioner of Labor John Brooks, Deputy Commissioner of Labor Michael Ragland, North Carolina OSHA Director James Oppold, and others, failed to require that Imperial Food Products, Inc. be inspected despite all the information available to defendants which demonstrated that the imperial Food Products, Inc. plant in Hamlet, North Carolina was highly likely to have working conditions in gross deviation from those prescribed by law.

76. Upon information and belief, the defendants, through Compliance Bureau Chief Richard Amos and District Safety Supervisor Frank Trogdon, failed to require that compliance officers or others in the employment of defendants inspect the Imperial Food Products, Inc. plant in Hamlet, North Carolina prior to the fire which gave rise to this action. Imperial Foods Products, Inc. had a presence in the State of North Carolina for a period of years before the fire which injured claimant, and in that entire time, no inspection was

conducted despite the manifest and patent need to inspect regularly the Imperial Foods plant in Hamlet.

77. Upon information and belief, John Brooks, Michael Ragland, James Oppold, Richard Amos, and Frank Trogdon had supervisory and other responsibilities to assign compliance safety and health officers, including but not limited to Douglas Jones, Charles Johnson, J. A. Bolton, David Poole, Tom Hayes, and Rodger Griffin, to inspect industries in Richmond County and surrounding areas, including the Imperial Food Products, Inc. plant in Hamlet, but did not direct that said plant be inspected. The defendants, through their agents, failed to require such inspections, thereby breaching duties owed to claimants.

78. Defendants in the exercise of reasonable care and by reasonable inspection knew or should have known of the violative conditions at the Imperial Food Products, Inc. plant in Hamlet, including, without limitation, the following: (1) the failure of Imperial Food Products, Inc. to furnish each of its employees conditions of employment which were free from recognized hazards, (2) the failure of Imperial Foods to maintain a fire suppression sprinkler system as required by law, (3) the failure of Imperial Foods to provide a proper evacuation plan and means of egress should the plant catch fire, (4) the failure of Imperial Foods to provide unlocked, unblocked and operable exits as required by law, (5) the failure of Imperial Foods to require adequate safety precautions considering the

highly flammable substances being used in the presence of cooking and frying operations and the highly corrosive materials being used, (6) the failure of Imperial Foods to label adequately exits or identify doors which were not exits so employees could find their way out of the plant in event of a fire, (7) the failure of Imperial Foods to provide adequate fire alarm facilities to alert employees to smoke or fire, (8) the failure of Imperial Foods to conduct fire exit drills in order to create an orderly means of escape, and (9) the failure of Imperial Foods to train employees in fire extinguisher use and fire containment in emergencies to protect the lives of employees.

79. The defendants negligently acted or failed to act in all manners alleged in paragraphs 1-78 of this Verified Claim and thereby unreasonably, oppressively and manifestly abused their discretion. Defendants were also negligent and abused their discretion in other manners, including, but not limited to, the following:

a. Defendants negligently failed to maintain safety standards at the same level as required by the Federal Government.

b. Defendants negligently failed adequately to staff, train, and maintain personnel, despite the availability of federal and state funds for this purpose, and negligently

MOATES VERIFIED CLAIM, CONTINUED . . .

maintained an unacceptably high rate of vacancy among inspectors.

c. Defendants negligently failed to provide adequate funding for enforcement of OSHANC in violation of their statutory, regulatory and common law duties.

d. Defendants negligently failed to provide adequate plans for inspection pursuant to OSHANC in violation of their statutory, regulatory and common law duties.

e. Defendants negligently failed to use funds made available by the Federal Government and State Government for the hiring and training of inspectors and the carrying out of inspections.

f. Defendants negligently focused inordinate resources on follow up visits to work sites already inspected and negligently diverted resources to pre-occupancy inspection of migrant labor camps, thereby negligently leaving insufficient time and resources for unannounced general scheduled inspections of other companies and work sites, including the Hamlet plant.

g. Defendants negligently failed to provide for the safe and healthful employment and places of employment of claimant at least as effective as that provided

MOATES VERIFIED CLAIM, CONTINUED . . .

and required by the federal government pursuant to the Federal OSHA Act.

h. Defendants negligently failed to discharge their duties of inspection and enforcement under statutory, regulatory and common law, by not conducting regular inspection of the Hamlet plant, proximately causing the injuries suffered by claimant, and the damages suffered by each claimant.

i. Defendants in the exercise of reasonable care knew or should have known the history of noncompliance with the Federal OSHA Act by Imperial Food Products, Inc. in the Commonwealth of Pennsylvania, including as to the particular types of hazards Imperial Foods was cited for maintaining there - which hazards were also present at the Hamlet plant and which were a cause of the September 3, 1991 fire - and therefore should have regularly inspected the Hamlet plant, but negligently failed to do so at any time prior to the fire which injured claimant.

j. Defendants in the exercise of reasonable care knew or should have known of the previous fires at the Imperial Food Products, Inc. plant in Hamlet, North Carolina, but negligently failed to inspect said plant prior to the September 3, 1991 fire to determine whether the safety of the workers at that plant was being compromised.

MOATES VERIFIED CLAIM, CONTINUED . . .

k. Defendants negligently failed to conduct any inspection of the Hamlet plant prior to the September 3, 1991 fire, which inspection, if conducted, would have disclosed the violative conditions and defects and led to the issuance of citations and the abatement of hazards or the shutdown of the Imperial Food Products, Inc. plant in Hamlet, North Carolina. Defendants' negligent failure to conduct such inspections was a breach of their duties to claimants and was a proximate cause of the injuries suffered by claimant and the damages suffered by each claimant.

80. The acts of negligence complained of herein, and other acts of negligence by defendants which will or may be disclosed during discovery and trial of this action, were breaches of duty to each claimant and were the proximate and direct cause of the injuries suffered by claimant, and the damages suffered by each claimant, for which each claimant is entitled to recover.

81. That as a result of the negligent acts and omissions of the defendants, and also resulting from their unreasonable, oppressive and manifest abuses of discretion, claimant Mildred Lassiter Moates has been damaged in a sum in excess of TEN THOUSAND AND N0/100 DOLLARS ($10, 000. 00) representing her personal injuries.

82. That as a further result of the negligent acts and omissions of the defendants, and also resulting from their

MOATES VERIFIED CLAIM, CONTINUED . . .

unreasonable, oppressive and manifest abuses of discretion, claimant Olin Dellano Moates has been damaged in a sum in excess of TEN THOUSAND AND N0/100 DOLLARS ($10,000.00) representing his loss of consortium.

WHEREFORE, claimants prays that they each: (1) Have and recover of defendants a sum in excess of TEN THOUSAND AND NO/100 DOLLARS ($10,000.00) as a result of the negligent acts and omissions and the unreasonable, oppressive and manifest abuses of discretion by the defendants, and (2) such other and further relief as may be appropriate.

WOODROW W. GUNTER, II

By: /s/ George Wayne Goodwin
for Woodrow W. Gunter, II
Attorney for Claimants
Post Office Drawer 249
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MOATES VERIFIED CLAIM, CONTINUED . . .

NORTH CAROLINA INDUSTRIAL COMMISSION
I. C. NO. TA- 13067

MILDRED LASSITER MOATES AND OLIN DELLANO MOATES,	)	
Claimants,	)	AFFIDAVIT
	)	AND
v.	)	VERIFICATION
NORTH CAROLINA DEPARTMENT OF LABOR, AND NORTH CAROLINA DEPARTMENT OF LABOR, DIVISION OF OCCUPATIONAL SAFETY AND HEALTH,	)	
Defendants.	)	

Mildred Lassiter Moates and Olin Dellano Moates, having first been duly sworn, depose and say:

1. The name of the claimants are Mildred Lassiter Moates and Olin Dellano Moates. Mr. and Mrs. Moates reside at Route 1, Box 152AE, Rockingham, Richmond County, North Carolina 28379.

2. The claims asserted against the North Carolina Department of Labor, and the North Carolina Department of Labor, Division of Occupational Safety and Health, and the

MOATES VERIFIED CLAIM, CONTINUED . . .

names of the individual employees, upon whose negligence the claims are based, are included in the Verified Claim to which this Affidavit and Verification is attached.

3. Each claimant is seeking to recover all damages permitted under the North Carolina Tort Claims Act, N.C.G.S. §143-291 through N.C.G.S. §143-300.1. The claimed damages are described in the Verified Claim to which this Affidavit and Verification is attached.

4. The time and place the injury occurred are described in the Verified Claim to which this Affidavit and Verification is attached.

5. The facts and circumstances surrounding the injury and giving rise to this claim are stated and described in the Verified Claim to which this Affidavit and Verification is attached.

6. The contents of the Verified Claim to which this Affidavit and Verification is attached are adopted and incorporated herein by reference as though specifically set forth herein.

7. The contents of the Verified Claim are true to the knowledge of the undersigned, except as to those matters stated on information and belief, and as to those matters, they believe them to be true.

MOATES VERIFIED CLAIM, CONTINUED . . .

This 26th day of August, 1993.

/s/ MILDRED LASSITER MOATES

/s/ OLIN DELLANO MOATES

Subscribed and sworn to
before me this 26th day of August, 1993.

/s/ Sondra U. Honrese
Notary Public

My Commission Expires: February 26, 1998

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MOTION TO DISMISS CLAIM, FILED NOVEMBER 30, 1993

NORTH CAROLINA INDUSTRIAL COMMISSION
I. C. NOS. TA-12975 through TA-13076

MULTIPLE CLAIMANTS,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	MOTION TO
	)	DISMISS
NORTH CAROLINA DEPARTMENT	)	CLAIM
OF LABOR, and NORTH CAROLINA	)	
DEPARTMENT OF LABOR,	)	
DIVISION OF OCCUPATIONAL	)	
SAFETY AND HEALTH,	)	
	)	
Defendants.	)	

NOW COME the Defendants pursuant to Rule T201 of the Rules of the Industrial Commission and other applicable law and move the Commission for an order dismissing the plaintiffs' claims, on the basis of the failure to state a claim upon which relief can be granted, pursuant to N.C. R. of Civ. P. 12(b)(6); and, therefore additionally, on the basis of the sovereign immunity enjoyed by the defendants pursuant to N. C. R. Civ. P. 12(b)(1) and 12(b)(2). In support of their motion, the defendants attach a memorandum of law.

WHEREFORE, for the reasons stated in the attached memorandum of law, the defendants move the Industrial Commission for an order dismissing the plaintiffs' claims; and

MOTION TO DISMISS CLAIM, CONTINUED . . .

that the defendants have such other further relief as the Commission deems just and proper.

This the 30th day of November, 1993.

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No. 98-378

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

JANET B. STONE, *et al.*,
Petitioners,

v.

NORTH CAROLINA DEPARTMENT OF LABOR and
NORTH CAROLINA DEPARTMENT OF LABOR,
OCCUPATIONAL SAFETY AND HEALTH DIVISION,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

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On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

REPLY BRIEF FOR PETITIONERS

Janet B. Stone, and each of the other plaintiff-petitioners named in the caption of the Petition for Writ of Certiorari in this matter ("Petition"), respectfully submit this Reply Brief in Support of Petition for a Writ of Certiorari ("Reply Brief") under Rule 15.6 of the Rules of the Supreme Court of the United States for the purpose of addressing new points raised in defendants' Brief in Opposition to Plaintiffs' Petition ("Brief in Opposition").

I. PETITIONERS PROPERLY RAISED BEFORE THE SUPREME COURT OF NORTH CAROLINA THE QUESTION NOW PRESENTED BY THEIR PETITION.

Defendants' Brief in Opposition contends the federal question petitioner-plaintiffs ("plaintiffs") present is not

appropriate for review because it was not properly raised before the Supreme Court of North Carolina. (Brief in Opposition at 6-11). Yet, the appendix to defendants' own brief contradicts the position they now take. Plaintiffs have fulfilled all prerequisites for presenting the federal question.

A. The Principles Governing Review of Federal Issues Presented to State Courts Are Well Settled.

State court litigants may seek review of "[f]inal judgments or decrees rendered by the highest court of a State in which decision could be had . . . [b]y writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of . . . the United States." 28 U.S.C.S. § 1257 (1990). Before this Court will review the decision of a state's highest court, it first examines whether the federal claim was presented below in a way that permitted the state court to render judgment on it. In *Adams v. Robertson*, the Court summarized the law as follows:

> With "very rare exceptions," *Yee v. Escondido*, 503 U.S. 519, 533, 112 S.Ct. 1522, 1531, 118 L.Ed.2d 153 (1992), we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.

Adams v. Robertson, 520 U.S. 83, ——, 117 S.Ct. 1028, 1029, 137 L.Ed.2d 203 (1997) (citations omitted). In determining whether it has jurisdiction, this Court first examines the opinion below:

> When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented . . . and the aggrieved party bears the burden of defeating this assumption . . . by demonstrating that the state court had "a fair opportu-

> nity to address the federal question sought to be presented here."

Id. (citations omitted). To satisfy this requirement, a petitioner may show that "it presented the particular claim at issue . . . with 'fair precision and in due time.'" *Id.* at 1030 (citations omitted).

Adams cites earlier cases which provide guidance in determining whether a federal issue was properly presented. A federal claim will not be considered in this Court "unless it had been either raised or squarely considered and resolved in state court." *Illinois v. Gates*, 462 U.S. 213, 218, 103 S.Ct. 2317, 2321, n.1 (1983). It is not a barrier to review if the federal claim was argued below in some fashion, albeit differently than it is argued in this Court:

> In *Dewey v. City of Des Moines*, 173 U.S. 193, 197-98, 19 S.Ct. 379, 380-81, 43 L.Ed. 665 (1899), the fullest treatment of the subject, the Court said that "if the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the [lower court's] judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued. Parties are not confined here to the same arguments which were advanced in the courts below on a Federal question there discussed."

Id. at 220, 103 S.Ct. at 2322 (brackets in original).

Gates acknowledged that *Dewey* is the key case for evaluating whether a federal question was adequately raised below. According to *Dewey*, "the court must be able to see clearly from the whole record that a provision of the constitution or act of congress is relied upon by the party who brings the writ of error, and that the right thus claimed by him was denied." *Id.* at 198, 19 S.Ct. at

381, 43 L.Ed. 665 (citations omitted). *Dewey* describes how that standard is to be satisfied:

> Although no particular form of words is necessary to be used in order that the federal question may be said to be involved, within the meaning of the cases on this subject, there yet must be something in the case before the state court which, at least, would call its attention to the federal question as one that was relied on by the party, *and then, if the decision of the court, while not noticing the question, was such that the judgment was, by its necessary effect, a denial of the right claimed or referred to, it would be sufficient. It must appear from the record that the right set up or claimed was denied by the judgment or that such was its necessary effect in law.*

Id. at 199, 19 S.Ct. at 381, 43 L.Ed. 665 (emphasis added; citations ommitted). Mere failure of the state court to address the federal issue does not, therefore, defeat jurisdiction, provided that the federal rights are "set up or claimed in such a way as to bring the subject to the attention of the state court." *Id.*

What a petitioner presents to the trial tribunal helps determine whether federal jurisdiction exists. For instance, a litigant's failure to raise a federal claim in a civil complaint may suggest the issue has not been properly presented to the state court. *Yee v. Escondido,* 503 U.S. 519, 533, 112 S.Ct. 1522, 1531, 118 L.Ed.2d 153 (1992). But where the federal issue is included in a trial court motion and argued on appeal, it is properly preserved for further review here despite failure of the state's highest court to rule on it. *Street v. New York,* 394 U.S. 576, 582-83, 89 S.Ct. 1354, 1360-61, 22 L.Ed.2d 572 (1969). Raising a federal issue in a civil complaint, and then briefing it to the state's highest court, is certainly adequate to confer appellate jurisdiction upon this Court.

B. Plaintiffs Presented the Federal Issue That Is Under Consideration Throughout the State Court Proceedings.

In their pleadings, briefs, and oral presentations, plaintiffs have unfailingly alleged and argued that defendants' negligence in discharging their duties arising under the Federal OSHA Act denied plaintiffs' their federally-protected rights. 29 U.S.C.S. § 651 *et seq.* (1990). This federal legislation establishes duties which defendants *must* discharge once they have agreed to establish and implement a State OSHA program. *See* Petition at 5-6. Defendants failed to satisfy these standards in breach of their duties under federal law. This point has been made throughout the course of the proceedings and lies at the heart of plaintiffs' claims.

Plaintiffs' specific allegations of federal law violations include the following: [1] Defendants are charged with the duty of enforcing occupational safety and health standards in North Carolina. (App. at 2a, 4a). These duties were imposed by federal and state statutes. (App. at 2a-6a). The Federal OSHA Act requires defendants to assure that their State OSHA program is at least as effective in providing safe and healthful employment and places of employment as the Federal program. (App. at 2a-3a). Federal law requires the State, once it assumes control of occupational safety and health laws, to provide sufficient legal authority, personnel, funding, enforcement, and the like to achieve for plaintiffs and other similarly-situated persons an equivalent level of protection from workplace injury as that enjoyed by persons who work where Federal OSHA personnel have enforcement responsibilities. (App. at 3a).

Plaintiffs also alleged breach of defendants' federal duties and violation of the plaintiffs' federal rights. The

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[1] Excerpts from one of the verified claims filed in this action, which is fairly representative of all such claims, are set forth in the appendix to this Reply Brief.

United States Department of Labor has the right and duty not only to give, but also to withhold or revoke, its approval of a state OSHA program. (App. at 2a-4a). In its investigation after the Hamlet fire, conducted pursuant to the Federal OSHA statutes and rules, the Department found that defendants had an insufficient number of inspectors, inspections, and programs for planned inspections. (App. at 6a-8a). The Hamlet fire investigation disclosed defendants' violations of statutory, regulatory and other duties to plaintiffs, including duties arising under the Federal OSHA Act. (App. at 6a-8a). Defendants' State OSHA program suffered from operational deficiencies that made it less effective than the federal program. (App. at 8a). As the plaintiffs alleged, "defendants failed to carry out their duties under the Federal OSHA Act, the State OSHA program, and OSHANC on a level at least as effective in providing safe and healthful employment and places of employment as the standards promulgated by Congress and the United States Department of Labor under the Federal OSHA Act." (App. at 8a). Defendants' negligent failure to discharge those duties, despite having notice of repeated violations by this employer, of previous fires on this premises, and of existing hazards at the Hamlet plant, was a proximate and direct cause of the deaths and injuries complained of in this action. (App. at 8a-11a).

The allegations demonstrate that plaintiffs rely, in large part, upon their federal claim that defendants failed to maintain State OSHA enforcement safety standards at the the same level as the federal program. (App. at 9a). Plaintiffs pressed this federal claim in the trial division, and then in the North Carolina Court of Appeals, which held that they had stated a claim upon which relief could be granted. (Petition, App. at 22a-26a).

Defendants appealed to the Supreme Court of North Carolina, the State's highest court. Defendants devoted

a whole subsection of their brief to arguments arising from plaintiffs' Federal OSHA claims.[2]

In response, plaintiffs' brief[3] argued that the North Carolina OSHA program only came into existence by virtue of the Federal OSHA Act, under which defendants assumed the duty to implement and enforce occupational safety and health standards. (App. at 13a-15a). Federal statutes require any state with an approved OSHA program to fulfill a "continuing obligation to provide safety standards, funding, and enforcement at least as effectively as that provided under the Federal OSHA Act and Regulations. 29 U.S.C. § 667(c,f); 29 C.F.R. § 1902.3 *et seq.*" (App. at 13a). Plaintiffs argued:

> [F]ederal statutes and regulations impose on defendants a legal duty to maintain the State OSHA Program at the same level of effectiveness as the Federal OSHA Program 29 U.S.C. § 667 . . . Yet, the United States Department of Labor investigated the defendants' program as a result of the Hamlet fire and determined that they had failed to carry out their duties.

(App. at 15a). Moreover, plaintiffs showed the Supreme Court of North Carolina that defendants had an insufficient number of inspectors, inspections, and programs, as well as insufficient funding, personnel, and planning under the federal standards. (App. at 16a-17a). Plaintiffs argued that "Defendants maintained work place safety at a less effective level than the Federal program provides and requires." (App. at 16a). Moreover, the United States Department of Labor's inquiry and investigation estab-

---

[2] Excerpts from defendants' brief to the Supreme Court of North Carolina, containing their argument about liability arising under the Federal OSHA Act, are set forth in the Appendix to this Reply Brief. (App. at 23a-27a).

[3] Excerpts from plaintiffs' brief to the Supreme Court of North Carolina are set forth in the appendix to this Reply Brief. (App. at 12a-22a).

lished serious violations of defendants' statutory duties under 29 U.S.C. § 667. (App. at 17a).

Plaintiffs compared defendants' inspection program at the Imperial Foods Products plant in Hamlet, North Carolina, with the Federal program at the Imperial Food Products plant in Pennsylvania. (App. at 18a). Citing federal law, plaintiffs argued that the OSHA is a remedial statute to be liberally construed in favor of its beneficiaries, and that duties arising thereunder were intended to flow to the workers they protect. (App. at 20a). Plaintiffs argued, "Where state and federal statutes and regulations require the State to take affirmative action and it fails to act, proximately causing injury to others, negligence is present. Its liability under the Tort Claims Act necessarily follows." (App. at 21a).

Plaintiffs met certain of defendants' arguments that federal law was inapplicable by stating:

> Defendants argue that the Federal OSHA Act does not create "an independent basis for a cause of action on behalf of the employee against either the plaintiff's employer or a third party who is not the plaintiff's employer." . . . Defendants' argument is off point and misapprehends plaintiffs' claims.
>
> The Federal OSHA Act and OSHANC established certain duties, violation of which can have effects both inside and outside the OSHA compliance system. For instance, committing an OSHANC violation can lead to the issuances of a citation. . . . It is also evidence of negligence in a civil suit. . . . Therefore, compliance with OSHA regulations is relevant to civil liability even though OSHA does not itself create an independent class of claims against employers.
>
> Similarly, while OSHA does not set up a new and independent class of claims against the government, it is pertinent to the State's negligence liability under another statute—the Tort Claims Act. . . .

> An independent statutory cause of action need not be created for the statute to be relevant, or even dispositive, as to the standard of care. In this case, plaintiffs were injured by defendants' failure to fulfill both their statutory duties and their duties of reasonable care owed to plaintiffs—members of the work force who are the beneficiaries of OSHANC. . . . As such, defendants are liable under the Tort Claims Act.

(App. at 21a-22a).

Plaintiffs continued to press the federal question in their Petition for Rehearing to the Supreme Court of North Carolina (App. at 28a-37a), alluding to defendants' continuing obligation to provide safety standards, funding, and enforcement at least as effective as provided under the Federal OSHA Act and Regulations. (App. at 29a-30a). Defendants had "asked the federal government to stay out of [the] business [of enforcing occupational safety and health laws] in North Carolina and, in exchange, voluntarily assumed an external standard of measurement—the requirement that their program be at least as effective as the federal OSHA program. 29 U.S.C. § 667(c,f); 29 CFR § 1902.3." (App. at 35a). Moreover, plaintiffs showed that decisions by this Court (particularly, *Indian Towing Co. v. United States of America*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955)), had repudiated under federal law the very doctrine the Supreme Court of North Carolina applied to defeat plaintiffs' claims. (App. at 30a-34a).

When the North Carolina Supreme Court permitted defendants to violate the federal standard without consequences, relying on the state law theory that they owed no duties to plaintiffs, it ran afoul of the Federal OSHA Act. State law policies cannot trump federal law, as plaintiffs have maintained throughout this litigation.

In summary, plaintiffs presented and pressed for a ruling below that recognized their entitlement to protection

by defendants equal to that provided by federal law. The Supreme Court of North Carolina wrongly allowed defendants to deny that protection by expanding and invoking the State's public duty doctrine, under which the Court concluded that defendants owed no duties to the plaintiff employees, or any other workers in North Carolina. Because this very doctrine has been rejected by this Court and other federal court decisions arising out of the Federal OSHA Act and the Federal Tort Claims Act, the North Carolina Supreme Court's reliance on the public duty to defeat plaintiffs' federal claims violates their federal rights.

Plaintiffs' Petition should be allowed and the decision of the Supreme Court of North Carolina reversed, not only to help redress the grievances of the victims of one of the Nation's worst industrial disasters; but also to avoid subjecting all industrial workers in the country's tenth most populous state to a continuing denial of their federal right to be treated equally with workers who toil in jurisdictions where OSHA is federally enforced.

CONCLUSION

The Petition for a Writ of Certiorari should be granted, the decision of the Supreme Court of North Carolina reversed, and this case remanded for further proceedings not inconsistent therewith.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX

Verified Claim of William Kelly, Jr., dated 24 August 1993

NORTH CAROLINA INDUSTRIAL COMMISSION

I.C. NO. TA-13053

WILLIAM KELLY, JR., Administrator of the Estate of BRENDA GAIL KELLY, Deceased,
Claimant,

v.

NORTH CAROLINA DEPARTMENT OF LABOR, and NORTH CAROLINA DEPARTMENT OF LABOR, DIVISION OF OCCUPATIONAL SAFETY AND HEALTH,
Defendants.

VERIFIED CLAIM

Claimant, William Kelly, Jr., by and through his undersigned counsel, alleges and says as follows:

THE PARTIES AND DEFENDANTS' OFFICERS, EMPLOYEES AND AGENTS

1. Claimant, William Kelly, Jr., is the duly authorized administrator of the estate of Brenda Gail Kelly, deceased, and is a resident of Richmond County, North Carolina. A copy of the Letters of Administration certifying William Kelly, Jr., as the administrator of the estate of Brenda Gail Kelly is attached as Exhibit A, Letters of Administration, Richmond County, 91-E-219.

2. Defendant the North Carolina Department of Labor (sometimes "D.O.L.") is a political subdivision of the State of North Carolina.

3. Defendant the Division of Occupational Safety and Health, also known as the Office of Occupational Safety and Health (sometimes "North Carolina OSHA") is a political subdivision of the State of North Carolina and is an office within the North Carolina Department of Labor responsible for promulgation and enforcement of workplace safety standards, and for the performance of duties under the Occupational Safety and Health Act of North Carolina (sometimes "OSHANC") and other applicable laws.

* * * *

THE DUTIES AND THE NEGLIGENT ACTS AND OMISSIONS OF THE DEFENDANTS

24. Defendants owed duties to the decedent Brenda Gail Kelly and to William Kelly, Jr., administrator of her estate, which were imposed by federal and state statutes and regulations and by the common law, and which defendants negligently breached proximately and directly causing the death of Brenda Gail Kelly and causing the claimant to suffer damages, amounting to an unreasonable, oppressive and manifest abuse of defendants' discretion. The claimant incorporates the allegations contained in paragraphs 1 through 23 of this Verified Claim herein, and makes additional allegations below.

Duties of Defendants

25. In 1970, the Congress of the United States enacted and the President of the United States signed into law the Occupational Safety and Health Act of 1970, codified at 29 U.S.C. § 651 *et seq.* (sometimes "Federal OSHA Act").

26. Under 29 U.S.C. § 667, a section of the Federal OSHA Act, a state may assume responsibility for development and enforcement of occupational safety and health standards on certain terms and conditions, provided that the state's program (someimes "State OSHA Program")

is or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated by Congress and the United States Department of Labor under the Federal OSHA Act.

27. Under 28 U.S.C. § 667, a State OSHA Program must provide sufficient legal authority and qualified personnel necessary for enforcement of such standards.

28. Under 28 U.S.C. § 667, a State OSHA Program must have adequate funds devoted to the administration and enforcement of such standards.

29. Under the Federal OSHA Act and relevant federal regulations, including 29 C.F.R. § 1901.1 *et seq*, it is the continuing duty of those states with a State OSHA Program to provide safety standards, funding, and enforcement at least as effective as the standards, funding and enforcement provided by the Federal OSHA Act and the regulations promulgated thereunder.

30. Pursuant to federal regulations located at 29 CFR § 1901.1 *et seq*, a state which has adopted a State OSHA Program must maintain adequate funding and may not diminish its level of enforcement activity below that existing at the time of the agreement with the federal government leading to adoption of a State OSHA Program.

31. Under 29 U.S.C. § 667 and 29 C.F.R. § 1901.1, *et seq*, a state with a State OSHA Program must provide for the development and enforcement of such standards as will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated by Congress and the United States Department of Labor, and state agents responsible for execution of such programs must have sufficient legal authority to enforce these standards.

32. Under 29 U.S.C. § 667 and 29 C.F.R. § 1902.3 *et seq*, states which have adopted State OSHA Programs are required to have a sufficient number of adequately

trained and qualified personnel necessary for the enforcement of standards to be at least as effective as under the Federal OSHA Act.

33. Under 29 C.F.R. § 1902.3 *et seq* states which have accepted State OSHA Programs are required to provide sufficient funds to make enforcement of their plans as effective as enforcement of the Federal OSHA Act.

34. On January 26, 1973, North Carolina's proposed plan for adopting and enforcing workplace safety and health regulations under a State OSHA Program received initial approval.

35. On October 6, 1976, the North Carolina State OSHA Program plan was certified as having completed all developmental steps.

36. Under N.C.C.S. § 95-126(b)(2)m, the North Carolina Department of Labor is designated as the agency required by law to administer OSHANC.

37. N.C.G.S. § 99-133 creates and establishes within the North Carolina Department of Labor a division known as the office of Occupational Safety and Health (sometimes called "North Carolina OSHA" herein).

38. Under N.C.G.S. § 95-133, the Commissioner of Labor is required by law to appoint a Director to administer North Carolina OSHA, subject to the direction and supervision of the Commissioner of Labor.

39. Under N.C.G.S. § 95-133, the Director has the legal duty to carry out the responsibilities of the State under the State OSHA Program.

40. Under N.C.G.S. § 99-133, the Director, subject to the approval of the Commissioner of Labor, is required to select a professional staff of qualified and competent employees to assist in the state-wide administration of OSHANC.

41. Under N.C.G.S. § 95-133, subject to the general supervision of the Commissioner of Labor, the Director

is made legally responsible for the administration and enforcement of laws, rules and regulations which it is the duty of North Carolina OSHA to administer and enforce including the power, jurisdiction and authority to, among other actions, do the following: (1) uniformly superintend, enforce and administer applicable occupational safety and health laws of the State of North Carolina; (2) make or cause to be made all necessary inspections, analyses and research for the purpose of seeing that all laws and rules and regulations which the office has the duty, power and authority to enforce are promptly and effectively carried out (3) make all necessary investigations, develop information and reports upon conditions of employee safety and health, and upon all matters relating to enforcement of this Article and all lawful regulations issued thereunder; and (4) issue all types of notices, citations, orders, and other pleadings, forms and notices necessary to enforce compliance with OSHANC.

42. Under N.C.G.S. § 95-4, the North Carolina Commissioner of Labor is required to appoint such employees in the various divisions of the Department of Labor as may be necessary to perform the work of the Department.

43. Under N.C.G.S. § 95-4, the Commissioner of Labor is required to make such rules and regulations as shall be necessary to properly carry out the duties imposed upon the Commissioner and the Department.

44. Under N.C.G.S. § 95-4, the Commissioner of Labor is required to secure the enforcement of all laws relating to the inspection of factories, mills, workshops, and other institutions and to appoint inspectors.

45. Under N.C.G.S. § 95-4, the Commissioner of Labor is required to inspect or cause to be inspected as often as practicable the factories and other establishments in this State where goods, wares or merchandise are manufactured, purchased or sold.

46. Under N.C.G.S. § 95-4, the Commissioner of Labor is required to enforce the laws and prosecute violation of the laws relating to such inspections.

47. Under N.C.G.S. § 95-136, to carry out the purpose and duties of OSHANC, the Commissioner of Labor, the Director of North Carolina OSHA, and their duly authorized agents are entitled to inspect workplaces and investigate whether violations of OSHANC exist.

48. Under N.C.G.S. § 95-137, the Director of North Carolina OSHA or his authorized representative has a duty to issue citations to an employer where there are reasonable grounds to believe that the employer has not fulfilled his duties as prescribed in OSHANC and the rules and standards promulgated thereunder.

49. Under N.C.G.S. § 95-138 and § 95-139, civil and criminal penalties are established for employer violations of OSHANC.

50. Under N.C.G.S. § 95-146, the Commissioner of Labor is required to furnish to the United States Secretary of Labor information and assurances that the State OSHA Program, North Carolina OSHA, is being administered by adequate methods and by standards and enforcement procedures which are and will continue to be as effective as federal standards.

51. Under N.C.G.S. § 95-150, the Commissioner of Labor is required to submit to the General Assembly a budget and request for appropriations to administer adequately the Occupational Safety and Health Act of North Carolina and to give satisfactory assurance that this State will devote adequate funds to the administration and enforcement of standards as required by the Federal OSHA Act.

Defendants' Breaches of Duty

52. Upon information and belief, defendants had an insufficient number of inspectors, inspections, and programs for planned inspection of industries, as found in an investigation conducted by the United States Department of Labor (sometimes "the United States Department of

Labor investigation") after the September 3, 1991 fire at the Imperial Food Products, Inc., plant in Hamlet.

53. In violation of the statutory, regulatory and common law duties described above, the defendants, through Commissioner of Labor John C. Brooks and others, failed to provide or obtain adequate funding for enforcement of OSHANC.

54. In violation of the statutory, regulatory, and common law duties described above, the defendants, through Commissioner of Labor John C. Brooks and others, failed to provide adequate personnel and plans for inspection pursuant to OSHANC.

55. As a result of the acts and omissions of defendants through their officers, employees and agents John C. Brooks, Michael D. Ragland, James A. Oppold, and others who were also required by law to provide adequate staffing for D.O.L. and North Carolina OSHA, defendants failed to staff, hire, train and retain an adequate number of inspectors to discharge the duties of defendants described herein and in the Federal OSHA Act, OSHANC, and other statutory and regulatory laws.

56. Upon information and belief, the North Carolina Department of Labor failed even to use funds made available by the Federal Government for the hiring and training of inspectors and the carrying out of inspections.

57. Upon information and belief, North Carolina OSHA has a high rate of vacancy among inspectors and many other performance deficiencies attributable to the acts and omissions of defendants through their agents in failing to provide adequate staffing.

58. Upon information and belief, defendants did not maintain the staffing level required by law and commensurate with available federal and state funding.

59. Upon information and belief, and as found in the United States Department of Labor investigation, defend-

ants focused inordinate resources on follow up visits to work sites already inspected, and diverted resources to pre-occupancy inspection of migrant labor camps, thereby leaving insufficient time and resources for unannounced general scheduled inspections of other companies, including the Imperial Foods plant in Hamlet, North Carolina.

60. Upon information and belief, North Carolina OSHA had serious operational deficiencies and was less effective than the federal program, as found in the United States Department of Labor investigation. Said deficiencies are a result of the failure of the North Carolina Department of Labor and North Carolina OSHA, through their agents, to discharge their statutory, regulatory and common law duties, including those owed to claimant and Brenda Gail Kelly, deceased.

61. Upon information and belief, North Carolina OSHA's administrative procedures were at the time of the Hamlet plant fire deficient and inadequate, as found in the United States Department of Labor investigation.

62. Upon information and belief, the programmed safety and health inspections conducted by defendant were insufficient, as found in the United States Department of Labor investigation.

63. Upon information and belief, defendants failed to carry out their duties under the Federal OSHA Act, the State OSHA Program, and OSHANC on a level at least as effective in providing safe and healthful employment and places of employment as the standards promulgated by Congress and the United States Department of Labor under the Federal OSHA Act.

64. The defendants' failure to fulfill their statutory, regulatory and common law duties was the proximate and direct cause of the death suffered by Brenda Gail Kelly, deceased, and the damages suffered by claimant.

* * * *

73. The defendants, through their agents named herein, owed a duty to Brenda Gail Kelly to inspect the

Imperial Food Products, Inc., plant in Hamlet, North Carolina, and to require abatement of the hazards there, including of the hazards that led to the death of Brenda Gail Kelly. The defendants' failure to conduct such inspections or cause them to be conducted proximately and directly caused her death.

* * * *

78. The defendants negligently acted or failed to act in all manners alleged in paragraphs 1-77 of this Verified Claim and thereby unreasonably, oppressively and manifestly abused their discretion. Defendants were also negligent and abused their discretion in other manners, including, but not limited to, the following:

a. Defendants negligently failed to maintain safety standards at the same level as required by the Federal Government.

b. Defendants negligently failed adequately to staff, train, and maintain personnel, despite the availability of federal and state funds for this purpose, and negligently maintained an unacceptably high rate of vacancy among inspectors.

c. Defendants negligently failed to provide adequate funding for enforcement of OSHANC in violation of their statutory, regulatory and common law duties.

d. Defendants negligently failed to provide adequate plans for inspection pursuant to OSHANC in violation of their statutory, regulatory and common law duties.

e. Defendants negligently failed to use funds made available by the Federal Government and State Government for the hiring and training of inspectors and the carrying out of inspections.

f. Defendants negligently focused inordinate resources on follow up visits to work sites already inspected and negligently diverted resources to pre-occupancy inspection of migrant labor camps, thereby negligently leaving insufficient time and resources for unannounced general

scheduled inspections of other companies and work sites, including the Hamlet plant.

g. Defendants negligently failed to provide for the safe and healthful employment and places of employment of the decedent Brenda Gail Kelly at least as effective as that provided and required by the federal government pursuant to the Federal OSHA Act.

h. Defendants negligently failed to discharge their duties of inspection and enforcement under statutory, regulatory and common law, by not conducting regular inspection of the Hamlet plant, proximately causing the injuries and death of decedent, Brenda Gail Kelly.

i. Defendants in the exercise of reasonable care knew or should have known the history of noncompliance with the Federal OSHA Act by Imperial Food Products, Inc. in the Commonwealth of Pennsylvania, including as to the particular types of hazards Imperial Foods was cited for maintaining there—which hazards were also present at the Hamlet plant and which were a cause of the September 3, 1991 fire—and therefore should have regularly inspected the Hamlet plant, but negligently failed to do so at any time prior to the fire which took the life of Brenda Gail Kelly.

j. Defendants in the exercise of reasonable care knew or should have known of the previous fires at the Imperial Food Products, Inc., plant in Hamlet, North Carolina, but negligently failed to inspect said plant prior to the September 3, 1991 fire to determine whether the safety of the workers at that plant was being compromised.

k. Defendants negligently failed to conduct any inspection of the Hamlet plant prior to the September 3, 1991 fire, which inspection, if conducted, would have disclosed the violative conditions and defects and led to the issuance of citations and the abatement of hazards or the shutdown of the Imperial Food Products, Inc., plant in Hamlet, North Carolina. Defendants' negligent failure to conduct such inspections was a breach of their duties to

claimant and Brenda Gail Kelly and was a proximate cause of her death.

79. The acts of negligence complained of herein, and other acts of negligence by defendants which will or may be disclosed during discovery and trial of this action, were breaches of duty to claimant and Brenda Gail Kelly, deceased, and were the proximate and direct cause of her death, for which claimant is entitled to recover.

* * * *

WHEREFORE, claimant prays that he: (1) Have and recover of defendants damages in excess of $100,000.00 as a result of the negligent acts and omissions and the unreasonable, oppresive and manifest abuses of discretion by the deefndants, and (2) such other and further relief as may be appropriate.

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Petitioners' New Brief to the Supreme Court of North Carolina, dated 25 August 1997

SUPREME COURT OF NORTH CAROLINA

No. 81PA97

STONE, *et al.*,
Plaintiffs-Appellees,
v.
NORTH CAROLINA DEPARTMENT OF LABOR, *et al.*,
Defendants-Appellants.

From the Industrial Commission

PLAINTIFF-APPELLEES' NEW BRIEF

QUESTION PRESENTED

Defendants have presented three questions in their Petition for Discretionary Review and their New Brief to this Court. In light of the manner in which these issues are linked and the procedural posture of this case, plaintiffs view these issues as subparts of a single question:

> HAVE PLAINTIFFS STATED A CLAIM FOR NEGLIGENCE UPON WHICH RELIEF CAN BE GRANTED?

* * * *

B. *The Defendants' Legal Duties.*

Over twenty-five years ago, Congress enacted the Occupational Safety and Health Act of 1970, now codified at 29 U.S.C. § 651 *et. seq.* (1990) (sometimes "Federal OSHA Act"). Pursuant to that Act, the United States Department of Labor has established standards regulating workplace safety and has implemented enforcement mechanisms. Relevant portions of the Federal OSHA Act, as well as regulations promulgated thereunder and State occupational safety and health legislation, are set forth in the appendix attached to defendants' brief. [Footnote omitted.] As an alternative to federal administration, the Federal OSHA Act allows a state to assume responsibility for development and enforcement of occupational safety and health standards, provided that the state complies with federal statutory and regulatory conditions. 29 U.S.C. § 667 (1990).

A proposed state program (sometimes "State OSHA Program") must be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under the Federal OSHA Act. 29 U.S.C. § 667(c). Proposed State OSHA programs must provide for sufficient legal authority and qualified personnel to enforce standards and must have adequate funds devoted to administration and enforcement. *Id.* Only then may a State OSHA program be approved. Each state with an approved OSHA Program has a continuing obligation to provide safety standards, funding, and enforcement at least as effective as that provided under the Federal OSHA Act and regulations. 29 U.S.C. § 667 (c,f); 29 C.F.R. § 1902.3 *et. seq.*

On 26 January 1973, the United States Department of Labor gave its initial approval to North Carolina's proposed plan for adopting and enforcing workplace safety and health regulations. (R p 10, 38). It certified the North Carolina program as having completed all devel-

opmental steps on 6 October 1976. (R p 11, 38). The North Carolina Department of Labor (sometimes "Department of Labor") was designated as the state agency responsible for administering OSHANC. N.C.G.S. § 95-126(b); (R p 11, 38). The Division of Occupational Safety and Health ("North Carolina OSHA")—a department of the North Carolina Department of Labor—was established under N.C.G.S. § 95-133 and is charged with the duty of carrying out the North Carolina OSHA program. (R p 11-14, 38-41). OSHANC and the regulations promulgated thereunder incorporate into North Carolina law the same safety standards that the federal government implements, with some variations. *Compare* Title 29 of the Code of Federal Regulations *with* Title 13 of the North Carolina Administrative Code.

The Commissioner of Labor, who is the Chief Executive Officer and highest official in the North Carolina Department of Labor, is required by law to appoint a director whose duty it is to administer North Carolina OSHA, subject to the Commissioner's supervision. N.C.G.S. §95-133 (1993); (R p 11-12, 39-40). The North Carolina OSHA Director has the legal duty to carry out the responsibilities of the State under the State OSHA Program. N.C.G.S. § 95-133; (R p 11, 39). State law compels that there be competent and qualified employees to assist in the state-wide administration and enforcement of OSHANC. N.C.G.S. § 95-133; (R p 11, 39). Federal law also requires defendants to maintain adequate staffing to provide for the safety and health of workers. 29 U.S.C. § 667(c, f); (R p 10, 38).

It is the duty of the officers and agents of the North Carolina Department of Labor and North Carolina OSHA uniformly to superintend, enforce and administer occupational safety and health laws; to make all necessary inspections, analysis and research for purposes of seeing that all laws, rules and regulations are promptly and efficiently carried out; to conduct investigations and develop

information and reports; and to enforce compliance with OSHANC by legal process. N.C.G.S. § 95-133; (R p 11-12, 39-40). The Commissioner of Labor, specifically and by statute, is "charged with the duty" through inspectors and other assistants, to secure the enforcement of all laws relating to inspection of factories, mills, workshops, and other institutions, and to conduct inspections as often as practicable of factories and other establishments where goods, wares or merchandise are manufactured, purchased or sold. N.C.G.S. § 9514. (R p 12-13, 40). The Department of Labor has the authority to inspect workplaces, and the duty to issue citations where there are reasonable grounds to believe the employer has not fulfilled its obligations. N.C.G.S. § 95-136 through -137 (1193; (R p 13, 41). Federal law requires that this work by the State be caried out at least at the same level of effectiveness as the federal OSHA system provides. 29 U.S.C. § 667.

Funding levels are also mandatory. N.C.G.S. § 95-150 requires the Commissioner to submit to the General Assembly a budget and request for appropriations and to give satisfactory assurance that the State will devote adequate funds to administration and enforcement of OSHANC standards. Federal law also mandates that a State OSHA Program be adequately funded. 29 U.S.C. § 667.

C. *Defendants Breached Duties Owed to Plaintiffs.*

The foregoing state and federal statutes and regulations impose on defendants a legal duty to maintain the State OSHA Program at the same level of effectiveness as the Federal OSHA Program. 29 U.S.C. § 667; (R p 9-10, 36-37). Yet, the United States Department of Labor investigated defendants' program as a result of the Hamlet fire and determined that they had failed to carry out their duties. (R p 14-18, 41-46). Significantly, Defendants failed to use funds that had been made available by the Federal Government for the hiring and training of inspectors and carrying out of inspections, and in fact refunded

money to the federal government. (R p 15, 42). By way of further example, the following constitutes other, but not all, of defendants' deficiencies:

1. Defendants had an insufficient number of inspectors.

2. Defendants conducted an insufficient number of inspections.

3. Defendants had insufficient programs for planned inspection of industries.

4. Defendants failed to provide or obtain adequate funding for the enforcement of OSHANC.

5. Defendants failed to provide adequate personnel for inspection.

6. Defendants failed to provide adequate plans for inspection.

7. Defendants failed to staff, hire, train and retain an adequate number of inspectors to discharge their duties.

8. Defendants maintained a hight rate of vacancies among inspectors and had many other performance deficiencies due to failing to provide adequate staffing.

9. Defendants did not maintain the staffing level required by law and commensurate with available federal and state funding.

10. Defendants focused inordinate resources on follow-up visits so that the same employers were being inspected repeatedly and other employers were not being inspected at all.

11. Defendants diverted resources to pre-occupancy inspection of migrant labor camps, leaving insufficient time and resources for unannounced general inspections of other employers.

12. Defendants maintained workplace safety at a less effective level than the Federal Program provides and requires.

13. Defendants had inadequate administrative procedures to monitor the OSHANC program. (R p 14-18, 41-46).

The United States Department of Labor's inquiry and investigation thus established serious violations of defendants' statutory duties under 29 U.S.C. § 667. This same conduct also demonstrates how seriously defendants violated North Carolina's statutory mandate for worker protection as set forth in N.C.G.S. § 95-4.

More importantly, by carrying out a completely inept OSHA program, defendants also breached their duties to the people working at the Imperial plant in Hamlet. (R p 23-24, 51). Though Imperial had been running the chicken processing plant since 1980, defendants never inspected it in the eleven year period it was operational. (R p 8, 35). They failed to do so even though two previous fires had occurred at the Hamlet plant.

* * * *

Had defendants fulfilled their legal duties to claimants, such as inspecting the plant at reasonable intervals during the previous eleven years, these conditions would have been discovered and corrected, and the catastrophic events of 3 September 1991 would never have occurred. (R p 2-24, 50-51). But defendants did not do what reasonable prudence and the statutes governing their existence required. Instead, they breached their duties to plaintiffs by failing to act at all before the fire. Now, twenty-five people are dead and at least eighty-one others injured as a result of defendants' negligence.

* * * *

[P]laintiffs here pursue claims based on negligent omissions. The Federal OSHA Act and North Carolina's OSHA Program impose on defendants the duty to develop standards at least as effective in providing safe and healthful employment and places of employment as provided under the federal OSHA program. 29 U.S.C.

§ 667. These statutes require defendants to conduct investigations, *id.*, and as often as practicable to inspect factories and other establishments where goods are manufactured, purchased or sold. N.C.G.S. § 95-4. The State has the duty to obtain sufficient funding and provide adequate personnel to enforce workplace safety laws and conduct inspections. 29 U.S.C. § 667. The General Assembly has, by statute, acknowledged defendants' duties to workers in N.C.G.S. § 95-126.

* * * *

* * * [Defendants] negligently failed to use information available from Federal OSHA to determine whether Imperial Foods was engaged in hazardous practices at its North Carolina plant as it had done at its Moosic, Pennsylvania plant, where Federal OSHA twice cited Imperial for burn or fire hazards between 1985 and 1987. The fact that federal inspections occurred at the Moosic plant twice in a two year period, compared to no inspections being conducted at the Hamlet plant in an eleven year period, is a compelling illustration of how defendants failed to fulfill their duties in a manner as effective as the Federal program.

Had defendants inspected the Hamlet plant at reasonable intervals as required by law, they would have discovered the hazardous conditions and brought the resources of the State to bear to protect the claimants. By not developing any reasonable plan for regular inspection of this facility, defendants breached their duties to plaintiffs. Rather than taking State action to protect the safety and health of the workers, as required by law, they did nothing. The Imperial plant thus became an inescapable tinder box, with the end result that over a hundred people were injured or killed. The Defendants' negligence was thus a proximate cause of the injuries suffered in the fire.

Though Imperial's negligent conduct in maintaining a premises where a fire was likely to occur may have been

the last act leading to a disaster, that fact is not a defense. Like the Department of Transportation in *Jordan,* the State's negligent failure to take advance corrective action was a proximate cause of this disaster. Even one minimal inspection effort would have prevented it from occurring. Had defendants enforced the requirements for sprinkler systems, the fire would never have gotten out of control. Had they enforced the requirement that the doors not be locked and blocked, the Imperial victims would have walked to safety. Because defendants negligently failed to carry out even these minimal inspections that would have led to a safe workplace, they breached their duties to claimants proximtely causing the Hamlet catastrophe.

B. *Defendants' Various Theories Do Not Bar Plaintiffs' Claims.*

In attempting to avoid their responsibilities to plaintiffs, defendants make a number of baseless technical arguments. They claim, among other "defenses," that they owed no duty to the workers of this State; and, in the alternative, that they may have owed a duty to the public, but not to any individuals. Stripped of its window dressing, defendants contention is that they owed plaintiffs no duties whatsoever and are therefore not liable to them or any workers in this State, regardless of how recklessly negligent and indifferent they were. Defendants' broad-based denial of their duties is unconscionable.

1. Defendants owed a duty of due care to plaintiffs.

Defendants claim that "a careful reading" of the governing statutes and administrative regulations reveals that the Federal OSHA Act is "enabling legislation" which "permits" but does not require a state government to develop workplace safety programs. (Appellants' Brief at 29). Thus, because they were not "required" to carry out any such actions, but undertook them freely, defendants owed duties only to Federal OSHA and not to the North Caro-

line labor force, including plaintiffs. (Appellants' New Brief at 29). This contrived analysis ignores the very purpose of federal and state worker safety statutes.

Once the State OSHA Program was adopted and approved, defendants were required to develop and enforce an occupational safety and health program providing for workplace safety at least as adequate as that provided by the Federal program. 29 U.S.C. § 667. OSHANC's legislative purpose is to protect the State's workers. *See, e.g.*, N.C.G.S. § 95-126(b); *Stone v. N.C. Dept. of Labor*, 125 N.C. 288, 292, 480 S.E.2d 410, 413 (1997). The same is true for Federal OSHA. 29 U.S.C. § 651. "OSHA is a remedial statute . . . to be liberally construed in favor of its beneficiaries." *Practico v. Portland Terminal Co.*, 783 F.2d 255, 261 (1st Cir. 1985). There can be no doubt that plaintiffs were among the intended beneficiaries of the federal and state OSHA acts. "One obvious purpose of this statute is to provide for the safety of the people who work in commercial establishments and to protect them from injuries in the workplace arising from unsafe conditions." *Stone*, 125 N.C. App. at 292, 480 S.E.2d at 410. Thus, defendants owed duties to North Carolina workers, not just to the Federal OSHA bureaucracy.

Because the State delegated administration of OSHANC to defendants, they were required to provide safety standards, funding, personnel and enforcement at least as effective as the standards, funding, personnel and enforcement provided by the Federal OSHA Act and regulations. 29 U.S.C. § 667; 29 C.F.R. § 1901.1 et seq.; *see also* 29 C.F.R. § 1902.3 et seq. Defendants' duties, which are ongoing and are subject to continuing review, 29 U.S.C. § 667(f), include adequate enforcement, such as regular inspections. 29 U.S.C. § 667(c) (3-4); 29 C.F.R. § 1902.3(d-h). These inspections were required to occur on a reasonably regular basis.

Given the purposes of OSHA and the States's mandate to provide for worker safety, it is irresponsible for defend-

ants to suggest that they owed duties only to Federal OSHA and none whatsoever to the people affected by their actions. Workers such as claimants, and not some administrative agency, are the intended beneficiaries of OSHA legislation.

* * * *

Where state and federal statutes and regulations require the State to take affirmative action and it fails to act, proximately causing injury to others, negligence is present. Its liability under the Tort Claims Act necessarily follows.

* * * *

5. Plaintiffs are not attempting to assert an implied right of action under Federal OSHA.

Defendants argue that the Federal OSHA Act does not create "an independent basis for a cause of action on behalf of the employee against either the plaintiff's employer or a third party who is not the plaintiff's employer." (Appellants' Brief at 30). Defendants' argument is off point and misapprehends plaintiffs' claims.

The Federal OSHA Act and OSHANC establish certain duties, violation of which can have effects both inside and outside the OSHA compliance system. For instance, committing an OSHANC violation can lead to the issuance of a citation. N.C.G.S. § 95-137 (1993). It is also evidence of negligence in a civil suit. *Cowan v. Laughridge Construction Co.*, 57 N.C. App. 321, 325, 291 S.E.2d 287, 290 (1982). In fact, egregious OSHANC violations are evidence that can help support a *Woodson* claim. *See Woodson v. Rowland*, 329 N.C. 330, 345, 407 S.E.2d 222, 231 (1991). Therefore, compliance with OSHA regulations is relevant to civil liability even though OSHA does not itself create an independent class of claims against employers.

Similarly, while OSHA does not set up a new and independent class of claims against the government, it is

pertinent to the State's negligence liability under another statute—the Tort Claims Act. When defendants fail to discharge their duties in the exercise of reasonable care, the State is liable just as an individual who violates a statute can be liable in negligence. For example, the motor vehicle code does not create an independent class of civil claims. Yet, traffic violations are nonetheless relevant in determining whether a driver has been negligent and is civilly liable. *Miller v. Lucas*, 267 N.C. 1, 147 S.E.2d 537 (1966). The guiding principle is that where a statute is enacted to protect a certain class of persons and a member of that group is injured, it is at least evidence of negligence and is in some circumstances negligence *per se*. *Id.; see also, e.g., Coleman*, 89 N.C. App. at 195-96, 366 S.E.2d at 7.

An independent statutory cause of action need not be created for the statute to be relevant, or even dispositive, as to the standard of care. In this case, plaintiffs were injured by defendants' failure to fulfill both their statutory duties and their duties of reasonable care owed to plaintiffs—members of the work force who are the beneficiaries of OSHANC. N.C.G.S. § 95-126(b). As such, defendants are liable under the Tort Claims Act.

* * * *

CONCLUSION

Wherefore, plaintiffs respectfully pray that this Court affirm the 4 February 1997 decision of the North Carolina Court of Appeals and remand this matter for trial on the merits.

This 25th day of August, 1997.

/s/ Charles L. Becton
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New Brief for State (Appellants) to the Supreme Court of North Carolina Dated 23 July 1997

SUPREME COURT OF NORTH CAROLINA
TENTH DISTRICT

No. 81PA97

STONE, *et al.*

v.

NORTH CAROLINA DEPARTMENT LABOR, *et al.*

From North Carolina Industrial Commission

NEW BRIEF FOR STATE
(Appellants)

* * * *

2. These Defendants Owe the Claimants No Duty Under FEDOSH.

Claimants assert that FEDOSH and its regulations, as well as OSHANC, established a duty of safety owed to them, individually, by the defendants Department of Labor and the Division of Occupational Safety and Health. (Claim ¶ 14.) Claimants recite numerous provisions of state and federal statutes and federal regulations which purportedly imposed a duty upon the defendants in

favor of the individual claimants. A review of these statutes and regulations in light of the applicable case law reveals that neither the federal statutes nor the regulations establish any such duty, and certainly not a duty in favor of these individual claimants.

A grant of authority to regulate does not impose a duty enforceable in tort:

> The assumption by the government of authority to regulate a particular activity should not render it liable in tort when it fails to exercise that authority to protect an individual from injury. *Zabala Clemente v. United States*, 567 F.2d 1140 (1st Cir. 1977), *cert. denied*, 435 U.S. 1006, 98 S. Ct. 1876, 56 L. Ed. 2d 388 (1978).

Faust v. South Carolina State Highway Dept., 721 F.2d at 938-39. Thus, claimants must plead some specific statutory provisions which impose a specific duty upon these defendants in favor of the individual claimants.

In support of a purported duty arising from FEDOSH, claimants recite the FEDOSH provisions, codified at 29 U.S.C. § 651 *et seq.* and, specifically, the statutes and rules which permit the individual states to establish and enforce occupational safety and health programs in lieu of federal enforcement. *See* 29 U.S.C. § 667 and 29 C.F.R. § 1901.1 *et seq.* and Claim ¶¶ 26-33.

A careful reading of these statutes and implementing regulations indicate that these enactments establish no duty on behalf of the allegedly negligent state agency nor on behalf of the allegedly negligent officers and employees owed to any individual claimant. The statutes plainly constitute enabling legislation which permits a state government to develop a state program and standards which are as stringent as the applicable federal standards. FEDOSH and its rules establish a relationship between the Secretary of Labor and the appropriate state authority, with the Secretary of Labor or his subordinate official

exercising his judgment and discretion concerning a state program. Any duties owed by these defendants, or the named officers and agents, plainly stand owed to FEDOSH, not the individual claimants here. As the South Carolina Court of Appeals noted:

> The law presumes that a statute which creates or defines the duties of a public office has the essential purpose of providing for the structure and operation of the government or of securing the general welfare and safety of the public. These statutes are not intended primarily to protect discrete individuals from particular types of harm. In such cases, any actual benefit or injury to a particular individual from the performance or nonperformance of the duties of the office is incidental to the purpose of the statute. As a rule then, a statute creating duties of office imposes on the public officer no duty of care towards individual members of the public. *See Parker v. Brown*, 195 S.C. 35, 10 S.E.2d 625 (1940) (adopting the public duty rule as the law of South Carolina.)

Rayfield v. S.C. Dept. of Corrections, 297 S.C. 95, 105, 374 S.E.2d 910, 915 (S.C. Ct. App. 1988). Here, the statutes and regulations establish the structure of the state-federal relationship for state plan states. Neither these statutes nor these regulations establish any duty owed to particular employees, including these claimants.

Numerous decisions hold that neither FEDOSH nor its regulations establish an independent basis for a cause of action on behalf of the employee against either the plaintiff's employer or a third party who is not the plaintiff's employer. [Citations omitted.] These decisions rest upon the plain construction of FEDOSH as a whole, as well as the statutory provision found in 29 U.S.C. § 653(b)(4) which provides that FEDOSH neither enlarges nor diminishes "common law or statutory rights, duties, or liabilities."

Congress, in enacting FEDOSH, never intended to impose upon the government liability to an employee injured in a workplace accident. As noted earlier, FEDOSH places upon the employer a nondelegable duty to provide a workplace free from known hazards. *See* 29 U.S.C. § 654(a). Congress also assigned to employees the duty to comply with the Act. *See* 29 U.S.C. § 654(b). Congress did not include a section (c) assigning duties and liabilities to the government. The inclusion of employer and employee duties indicates an exclusion of governmental duties. *Expressio unius exclusio alterius. See In re Taxi Co.*, 237 N.C. 373, 75 S.E.2d 156 (1953). Secondly, the statute contemplates voluntary compliance by the employer, with spot checks only by the government. Congress never appropriated funds for the army of inspectors required had they intended the government to assume a duty to the employees for workplace safety. *See Dunlop v. Rockewll Intern.*, 540 F.2d 1283 (6th Cir. 1976). Congress plainly intended to rely upon spot checks for compliance, and fully recognized that the allocation of resources to spot check compliance by employers and employees would fall within the discretionary function exception to the Federal Tort Claims Act. Thus, Congress knew that the federal government would not be liable. [Citations omitted.]

The congressional intent and the stautory scheme found in FEDOSH as well as the plain language of 29 U.S.C. § 653(b)(4) and the interpreing case law all indicate that no private cause of action for damages arises against the federal government, or any other third party under the Act. Thus, these claimants fail to state a claim under FEDOSH.

* * * *

These defendants owed these claimants no duty, either at common law or by statute or by rule. The Tort Claims Act does not support an action of this nature. This Court should reverse the Industrial Commission's Order affirming Deputy Commissioner Alston's decision in this matter

and dismiss this action. The court of appeals erred by failing to do so.

Respectfully submitted this the 23rd day of July, 1997.

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Petition for Rehearing Filed With the Supreme Court of North Carolina Dated 13 March 1998

SUPREME COURT OF NORTH CAROLINA

No. 81PA97

STONE, *et al.*,
Plaintiffs-Appellees,

v.

NORTH CAROLINA DEPARTMENT OF LABOR, *et al.*,
Defendants-Appellants.

From the Court of Appeals COA96-207

From the Industrial Commission Nos. TA-12975-TA13076, TA-13507-TA-13509, TA-13521

PLAINTIFF-APPELLEES' PETITION FOR REHEARING

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Plaintiffs, by and through their undersigned counsel and pursuant to Rule 31 of the North Carolina Rules of Appellate Procedure, hereby petition the Supreme Court of North Carolina to rehear the captioned matter on the grounds that the opinion of the Court, announced on 6 February 1998, overlooks and misapprehends certain

points of fact and law which, when properly considered, compel the conclusion that plaintiffs have stated a claim upon which relief can be granted. * * *

* * * *

II. THE DECISION IN STONE MISINTERPRETS THE TORT CLAIMS ACT

The majority opinion invokes canons of statutory construction in aid of its interpretation of the Tort Claims Act. However, in reaching the conclusion that the Legislature intended by passing the Act to adopt the public duty doctrine as a defense to tort claims against the State, the Court overlooks and misapprehends many of the most pertinent canons that, when considered, compel a contrary conclusion. The Court's analysis fails to take into account the history and purpose of the Tort Claims Act, the chronology surrounding its amendments, and well-considered decisions interpreting the Federal Tort Claims Act and similar statutes in other jurisdictions. * * *

* * * *

B. *The Tort Claims Act's History Bolsters Plaintiffs' Position That the Legislature Did Not Intend to adopt the Public Duty Doctrine.*

* * * *

[A]t the time the Legislature amended the Tort Claims Act to allow recovery for negligent omissions, it did so with full knowledge that the North Carolina Department of Labor was charged with the duty to inspect under Federal and State occupational safety and health legislation. North Carolina received initial approval of its OSHA program in 1973 (R p 10, 38) and was certified as having completed all developmental steps in 1976 (R p 11, 38). At the time the General Assembly made negligent omissions actionable in 1977, the State OSHA program was operative, and the legislature knew defendants had a continuing obligation to provide safety standards, funding,

and enforcement at least as effective as that provided under the Federal OSHA Act and Regulations. 29 U.S.C. § 667 (c,f); 29 C.F.R. § 1902.3 *et seq.* * * *

* * * *

C. *Other Courts Have Consistently Rejected the Construction of the Term "Private Person" that this Court Employed in Stone.*

Much of the Court's analysis turns on the Tort Claims Act reference to a "private person." The Act provides that the State is liable "under circumstances where [it], if a private person, would be liable to the claimant in accordance with the laws of North Carolina." N.C.G.S. § 143-291. In denying the plaintiffs the right to proceed, the Court declares that "[p]rivate persons do not possess public duties. Only governmental entities possess authority to enact and enforce laws for the protection of the public." (Slip op. at 6) (emphasis in the original). Thus, it holds, the public duty doctrine bars plaintiffs' claims.

* * * *

[T]he Court's approach to construction of the Tort Claims Act has been discredited for over forty years, beginning with *Indian Towing Company v. United States of America,* 350 U.S. 61, 100 L.Ed. 48, 76 S.Ct. 122 (1955). The Federal Tort Claims Act, which preceded the North Carolina act, utilizes comparison with a hypothetical private person when evaluating liability of the Federal government. *Compare* 28 U.S.C. § 2674 *with* N.C.G.S. § 143-291. Many states have tort claims legislation that track the federal act. In fact, this Court has relied on the Federal Tort Claims Act and cases interpreting it as a guidepost for understanding our own legislation since at least 1953. *See Lyon & Sons,* 238 N.C. at 32-33, 76 S.E.2d at 559. It is appropriate to continue that tradition here.

In *Indian Towing,* the United States Supreme Court considered claims brought under the Federal Tort Claims

Act. It construed that portion of the legislation providing that liability is to be imposed on the United States "in the same manner and to the same extent as a private individual under like circumstances." *Id.* at 64, 100 L. Ed. at 53, 76 S. Ct. 122 (quoting 28 U.S.C. § 2674). At the time of the *Indian Towing* decision, the Coast Guard was the only entity with the authority to establish and operate lighthouses. *Id.* at 66, 100 L.Ed. at 54, 76 S.Ct. 122. Because of this uniquely governmental role, the United States argued that it was not liable for the Coast Guard failing to maintain a lighthouse properly. Its contention was that the Tort Claims Act "must be read as excluding liability in the performance of activities which private persons do not perform. Thus, there would be no liability for negligence in performance of 'uniquely governmental functions.'" *Id.* at 64, 100 L.Ed. at 53, 76 S.Ct. 122.

The Supreme Court rejected this argument. In fact, it considered it to be an attempt to "push the courts into the 'non-governmental'-'governmental' quagmire that has long plagued the law of municipal corporations" *Id.* The Court continued:

> [T]he fact of the matter is that the theory whereby municipalities are made amenable to liability is an endeavor, however awkward and contradictory, to escape from the historical doctrine of sovereign immunity. The Federal Tort Claims Act cuts the ground from under that doctrine; it is not self-defeating by covertly embedding the casuistries of municipal liability for torts.

Id. at 65, 100 L. Ed. at 54, 76 S. Ct. 122. Thus, the Court would not import the "governmental function" grounds for avoiding liability into the Federal Tort Claims Act. Nor was the Court concerned that some actions giving rise to tort claims would result only from conduct that is exclusively "governmental."

> [I]f the United States were to permit the operation of private lighthouses—not at all inconceivable—the Government's basis of differentiation would be gone and the negligence charged in this case would be actionable. Yet there would be no change in the character of the Government's activity in the places where it operated a lighthouse, and we would be attributing bizarre motives to Congress were we to hold that it was predicating liability on such a completely fortuitous circumstance—the presence of identical activity.
>
> While the area of liability is circumscribed by certain provisions of the Federal Tort Claims Act, See 28 U.S.C. § 2680, all Government activity is inescapable "uniquely governmental" in that it is performed by the Government. . . .
>
> There is nothing in the Tort Claims Act which shows that Congress intended to draw distinctions so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation. . . . The broad and just purpose which the statute was designed to effect was to compensate victims of negligence in the conduct of governmental activities and circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws. Of course, when dealing with a statute subjecting the government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. Neither should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it.

Id. at 67-69, 100 L.Ed. at 55-56, 76 S.Ct. 122. The Court thus allowed the claim to proceed.

Commentators have uniformly interpreted *Indian Towing* as rejecting the type of reasoning that the *Stone* Court has adopted. The Second Restatement of Torts provides:

> [T]he [United States Supreme] Court has held that an activity is not excepted from the Federal Tort Claims Act because of the fact that it is peculiarly governmental in character. The phrase limiting liability to the situation where "a private person would be liable" was held not to mean that the Government would be immune solely because the activity was one in which a private person would not engage.

Rest. 2d of Torts § 895A (*Comment B*). Prosser and Keeton similarly clarify the meaning of the "private person" analogy:

> One other matter still occasionally causes some difficulty. Since governmental entities are not liable unless they commit a tort, there must be a duty to act and a breach of that duty. This is frequently expressed by saying that the government is not liable where a private person is not. The principle is undoubtedly correct, but it lends itself to misapplication. *Governmental entities carry out many activities that are not carried on at all by private persons, but this is not to say that the Government escapes liability for the Coast Guard's negligence merely because private persons do not operate a Coast Guard.* It is not specific activities of the government that must find a counterpart in private life, but juridical acts, duties or relationships. The fact that private persons do not legally operate prisons should not mean public entities are free to operate them negligently; what is important is that private persons who have custody of others are under certain duties of care. But the point is easy to overlook.

Prosser and Keeton on Torts, § 131 *(Lawyer's Edition, 5th Ed., 1998 Supp.)*.

There is a close connection between decisions such as *Indian Towing* and those decisions refusing to recognize the blanket protection of the public duty doctrine. * * *

* * * *

The tort claims acts of Florida, the Federal government, and North Carolina are similar. The Florida act waived immunity for "personal injury or death caused by the negligent or wrongful act or omission of any employee within the scope of his office or employment under circumstances in which the state or such agency, if a private person, would be liable." *Id.* at 1013 (quoting Section 768.28 of the Florida Statutes) (emphasis added). Following the reasoning of the United States Supreme Court in *Indian Towing, supra,* the Florida court rejected the government's argument that there was no waiver of immunity as to uniquely governmental functions "since private individuals do not perform" them. *Id.* at 1016. "For the reasons articulated [in *Indian Towing*], we refuse to place such a gloss on our waiver statute. To do so would essentially emasculate the act and the salutary purpose it was intended to serve." *Id.* at 1017.

* * * *

IV. THE PUBLIC DUTY DOCTRINE HAS NO APPLICATION TO THE FACTS OF THIS CASE.

The public duty doctrine has no application to the facts alleged in plaintiffs' verified claims. The cornerstone of plaintiffs' claims is that defendants did not inspect the plant during the eleven year period it was operational despite having actual or constructive notice of previous fires, employer misconduct, and the highly dangerous conditions existing there. It is this notice, combined with a failure to inspect in compliance with State and Fdeeral law, that forms the factual basis of the claims. The majority opinion overlooks or misapprehends this point as it focuses on a proposition which was never pled nor argued by plaintiffs: that allowing these claims to proceed would

"judicially impose an overwhelming burden of liability on defendants *for failure to prevent every employer's negligence* that results in injuries or deaths to employees." (Slip. Op. at 11; emphasis added). This concept of strict liability is not found in the plaintiffs' papers, and is, in fact, specifically rejected as a theory at page 33 of the Plaintiff-Appellees' New Brief.

* * * *

Defendants had a duty to act under the State and Federal laws governing their functions. They negligently failed to do so, proximately causing the Hamlet disaster. Because the public duty doctrine is inapplicable, their conduct is actionable.

* * * *

VI. THE COURT'S REASONING MISAPPREHENDS THE LEGISLATIVE SCHEME.

The Court's opinion expresses certain policy concerns which can only arise from a misapprehension of the plaintiffs' claims, the statutory framework underlying occupational safety and health laws, and of the proper roles of the various branches of government in the polity of this State. The fact of the matter is that defendants' responsibilities for inspection were not written on a clean slate.

They did not independently conclude it would be beneficial to the State to have occupational safety and health laws, undertake this obligation, and create their own enforcement standards. Rather, they asked the Federal government to stay out of this business in North Carolina and, in exchange, voluntarily assumed an external standards of measurement—the requirement that their program be at least as effective as the federal OSHA program. 29 U.S.C. § 667 (c,f); 29 C.F.R. § 1902.3.

Yet, the Court cites the following language in support of its decision:

> "[A] government ought to be free to enact laws for the public protection without thereby exposing its supporting taxpayers . . . to liability for failures of omission in its attempt to enforce them. It is better to have such laws, even haphazardly enforced, then not to have them at all." *Grogan* [*v. Commonwealth*, 577 S.W.2d 4,] 6 (emphasis added)

(Slip Op at 11).

The proposition is misapplied in this case. The choice in this case was not between having no legislation at all and having legislation that may help some workers, even if haphazardly enforced. Rather, the conscious decision the State made here was to reject federal enforcement of occupational safety and health laws by voluntarily undertaking the obligation to have a State enforcement program.

This situation renders the *Grogan* analysis meaningless. Nowhere in the federal legislation is it suggested that the State has the right to establish a program and enforce it "haphazardly" because that might be better for the State's workers than having no program at all. The State voluntarily undertook to assume occupational safety and health inspection tasks at a certain level of effectiveness and it failed miserably. The policy set forth in *Grogan* is inapplicable where, as here, the alternative was not an absence of legislation, but enforcement at a more competent level.

* * * *

CONCLUSION

WHEREFORE, plaintiffs respectfully pray that the Court allow their Petition for Rehearing, for the reasons set forth herein and in the certifications served herewith.

This the 13th day of March, 1998.

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